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IN THE SUPREME COURT OF ARKANSAS

No. 9297

HERBERT STITH, ET AL.,

Appellants,

v.

ED PINKERT, ET AL.

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Arkansas entered in this cause.

Opinion Below

The opinion of the Supreme Court of Arkansas is not reported as yet in the official Arkansas Reports, but, is reported in The Law Reporter, Vol. 92, No. 16, page 642. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A. A copy of the Motion To Rehear and the order of the Supreme Court of Arkansas denying rehearing are attached hereto as Appendix B. The Chancery Court of Pulaski County, Arkansas, did not render an opinion, but, did render a

decree, and a copy of said decree, findings of fact, conclusions of law and judgment are attached hereto as Appendix C.

Jurisdiction

The judgment of the Supreme Court of Arkansas was entered on November 13, 1950. The order of the Supreme Court of Arkansas denying rehearing was entered on December 11, 1950. A petition for appeal is presented to the Supreme Court of Arkansas herewith, to-wit, on December 29th, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

This cause was brought to recover the lands of appellants due to the sale of same under a foreclosure decree in proceedings where Sewer Improvement District 94 foreclosed and sold said lands without making James H. Stith, the owner of said lands, a party to the proceedings and without notice to him under authority of Act 207 of 1937, Acts of Arkansas, which provides that it is immaterial if an incorrect allegation of ownership is made in the proceedings and for constructive service as against residents of the State of Arkansas. The federal question was first raised by plaintiff-appellants in their complaint in the Chancery Court of Pulaski County, Arkansas, (R. 2-10 incl.) where they specifically set up that Act 207 of 1937, Acts of Arkansas, is unconstitutional being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States (R. 8). It was also alleged in the complaint as follows: "That at the time that said foreclosure suit was filed in 1935 the law required personal service to be had upon defendants and owners of the property situated in Improvement Districts. That Act 207 of 1937, upon which attempted service was had in said suit, being passed two years after the suit was filed, did not apply

to said suit, said Act is not retroactive and that service should have been had in accordance with the law at the time said suit was filed. That said Act 207 of 1937 is also unconstitutional, being in violation of due process clause of the 5th and 14th Amendments to the Constitution of the United States. An attempted service under that Act is also void as being in violation of the Constitution of the United States" (R. 8). The questions being that in addition to the Act 207 of 1937, Acts of Arkansas, itself being void as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States, that its application to the case at bar was also in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Said Act 207 of 1937 changed the basic nature of the proceedings from one not in rem to one in rem. These federal questions were pursued by plaintiffs-appellants in every step of the proceedings. The Supreme Court of Arkansas in passing upon these questions expressly held that Act 207 of 1937 in its opinion was valid and that said Act did not violate the due process clause of the Constitution of the United States and that under said Act 207 of 1937, Acts of Arkansas, that the incorrect allegation of the ownership of the lands in the foreclosure proceedings in the case at bar was immaterial and that said Act applied to the case at bar even though it made such proceedings an action in rem and even though said Act 207 of 1937 was enacted after the proceedings for foreclosure in the case at bar had commenced (Appendix A). These same federal questions were again urged and insisted upon in the Motion for Rehearing, filed in the Supreme Court of Arkansas, which was denied (Appendix B).

It was alleged in the complaint of appellants that the complaint, in the proceedings where appellants lands were fore-

closed and sold, named *Smith* as the owner of said lands, that the warning order named *Smith*, and that the decree named *Smith* as the owner, that the notice of the sale of said lands did not name anyone as the owner of said lands and did not sufficiently describe the lands to be sold, that the Board of Improvement of Sewer Improvement District 94 (a defendant in the case at bar) full well knew that *James H. Stith* was the owner of said lands and knew his correct address in the City of Little Rock, Arkansas, and yet at no time was he made a defendant to said proceedings. (R. 6-7). The federal question was raised immediately following and was part of aforesaid allegation in the complaint and was worded as follows: "Notice to *Smith* is not notice to *Stith*, and suit against *Smith* is not binding upon *Stith*, who was never made a party defendant; that said want of notice and not being made a party defendant in said suit constitutes the taking of the property of the plaintiffs herein without due process of law and in violation of the 5th and 14th Amendments to the Constitution of the United States and said sale and title of Ed Pinkert and Manie Schuman should be cancelled and set aside" (R. 7-8). The Supreme Court of Arkansas in considering these federal questions held that the naming of *Smith* instead of *Stith* in the complaint and warning order did not render void the foreclosure decree of the Chancery Court of November 23, 1937 and gave the reason for such holding as being that under Act 207 of 1937, Acts of Arkansas, that it was immaterial that the ownership of the lands was incorrectly alleged in the proceedings. The Supreme Court of Arkansas further held that it was immaterial and unnecessary, under said Act 207 of 1937, that the owner of the lands to be sold be named in the notice of the sale of same and that any insufficiency in the description of the lands in said notice of the sale was cured by the decree of the Chancery

Court confirming the sale. The effect of the holding of the Supreme Court of Arkansas being that a person's land can be foreclosed upon and sold without any notice whatsoever to him (Appendix A). This same federal question was again raised in the Motion To Rehear which rehearing was denied by the Supreme Court of Arkansas (Appendix B). The validity of Act 207 of 1937, Acts of Arkansas, was specifically challenged on federal grounds in the complaint of plaintiffs-appellants, the Supreme Court of Arkansas held said Act 207 of 1937 to be valid and to be consistent with the Constitution of the United States, and plaintiffs-appellants again challenged the validity of said Act 207 of 1937 on federal grounds in their motion to rehear, which the Supreme Court of Arkansas overruled and denied rehearing.

The Supreme Court of Arkansas failed and refused to take into consideration the prior laws, which have not been repealed, on the same express subject as Act 207 of 1937 along with Act 207 of 1937, Acts of Arkansas, in determining the law in the case at bar and by thus failing and refusing to consider said prior laws on the same express subject. The Supreme Court of Arkansas placed a construction and application of the law that is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. This failure of the Supreme Court of Arkansas to consider said prior laws came as a surprise and was wholly unanticipated by plaintiffs-apppellants and plaintiffs-appellants had no opportunity to anticipate and assert the federal question involved except in their petition for rehearing. This federal question was raised in the petition for rehearing for the first time and this was the only chance of raising this question as a federal question that the plaintiffs-appellants had. (Appendix B). When this question was raised

in the petition for rehearing the Supreme Court of Arkansas refused to consider same. These prior laws are expressly mentioned in the petition for rehearing (Appendix B) and are set out in full in Appendix D attached hereto. Same were argued as statutory construction before the Supreme Court of Arkansas. These said prior laws are still in full force and have not been repealed and are not in conflict with Act 207 of 1937, Acts of Arkansas, and if the Supreme Court of Arkansas would have considered said laws, then Act 207 of 1937 would have been construed and applied in a manner not inconsistent with the Constitution of the United States. By the Supreme Court of Arkansas considering said Act 207 of 1937 as standing alone without taking into consideration the other prior laws on the same express subject, plaintiffs-appellants rights are threatened under the Constitution of the United States because the construction placed upon said Act 207 of 1937 is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Plaintiffs-appellants had no opportunity to anticipate that the Supreme Court of Arkansas would fail and refuse to consider the other laws of Arkansas on the same express subject as that of Act 207 of 1937.

Plaintiffs-appellants raised another federal question for the first time in their petition for rehearing. The sale of the lands involved herein, by a commissioner appointed to make said sale, after same had been redeemed or partially redeemed constituted the taking of appellants lands in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States (Appendix B). Plaintiffs-appellants urged that they had the right to complete the redemption of their lands since a redemption certificate had been issued during the period of redemption which due to the carelessness or misprision of the clerk the

tax due for the year of 1934 had been left out. There has been a fixed rule under the decisions of the Supreme Court of Arkansas that under such circumstances a person could complete their redemption and a sale of the lands was error and void. However in the case at bar the decision of the Supreme Court of Arkansas, holding that the redemption certificate was not evidence that the owner of the lands had attempted to redeem same, came as a surprise and plaintiffs-appellants had no prior opportunity to assert this particular federal question.

The next federal question was raised for the first time in the petition for rehearing (Appendix B), the allegation and the question presented in same being that the holding of the Supreme Court of Arkansas that appellants were barred under the rule of stare decisis is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States, since appellants did not have their day in court. The Supreme Court of Arkansas held that the decision of *Pinkert* v. *Lamb,* 215 Ark. 879, was not res judicata and that appellants were not barred for that reason, but that the rule of law laid down in that case was controlling in the case at bar under the rule of stare decisis (Appendix A). In the case of *Pinkert* v. *Lamb,* 215 Ark. 879, the same lands were involved as in the case at bar, but, plaintiffs-appellants are the only persons having the legal title to same and plaintiffs-appellants were not parties to said suit and had no notice of same. Plaintiffs-appellants are non-residents of the State of Arkansas. Plaintiffs-appellants did not have their day in court in said case and the Supreme Court of Arkansas so held. The question of the rule of stare decisis had not been presented to the Supreme Court of Arkansas at any time, stare decisis was not pleaded at any time by defendants-appellees at any stage of the proceedings, and

the decision of the Supreme Court of Arkansas came as a surprise. The holdings that appellants were not barred by res judicata but were barred by stare decisis was an unexpected decision and gave plaintiffs-appellants no prior opportunity to assert this particular federal question, so appellants raised this question in their petition for rehearing for the first time. The decision in the case of *Pinkert* v. *Lamb*, 215 Ark. 879, was to the effect that Act 207 of 1937, Acts of Arkansas, was valid, however plaintiffs-appellants were not parties to that action even though the same lands were involved. If Act 207 of 1937, Acts of Arkansas, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States as is contended in the case at bar, then, so the decision in the case of *Pinkert* v. *Lamb*, 215 Ark. 897, is in error the same as the decision of the Supreme Court of Arkansas in the case at bar is in error. Stare decisis cannot apply to the case at bar under these facts and circumstances.

The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case: *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182; *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 3 of Sevier County, Ark.*, 266 U. S. 379; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *New York, ex rel, Bryant* v. *Zimmerman*, 278 U. S. 63, 67; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-8; *Craid* v. *Harney*, 331 U. S. 367, 373-4; *Sterling* v. *Constantin*, 287 U. S. 378, 398; *Creswill* v. *Grand Lodge*, 225 U. S. 246, 261; *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids*, 223 U. S. 655.

Questions Presented

James H. Stith was the actual owner and record owner and in possession of the lands involved in this action at the time Sewer Improvement District 94 filed suit to foreclose said lands for delinquent assessments due the District. Said foreclosure suit was filed in 1935 and in 1937, after Act 207 of 1937, Acts of Arkansas, was passed by the legislature, constructive service was had upon numerous land owners in the District by warning order under the provisions of said Act 207 of 1937, which provided for constructive service and provided that it was immaterial if the ownership of the lands was incorrectly alleged in such foreclosure proceedings. The law at the time said foreclosure suit was filed provided for personal service in such foreclosure proceedings. Other laws in full force and effect at that time in 1935 and which are still in full force and effect now since they have not been repealed are Act 85 of 1925, Acts of Arkansas, and Sections 5677, 5678, 5679 & 5700, Crawford & Moses Digest of the Statutes of Arkansas. These laws provide that the last owner of record be made a party defendant to such foreclosure proceedings and Act 85 of 1925, Acts of Arkansas, also provides that the owner of lands in municipal improvement districts as same is shown from the tax records of the district itself be made a party defendant to such proceedings. James H. Stith was the actual owner of the lands involved in this action, he was the last owner of record and he was the owner shown in the tax records of Sewer Improvement District 94. *James H. Smith* was named in the complaint, warning order and decree. *James H. Stith* was not named at any time in the proceedings and had no notice of the pendency of said proceedings. The Supreme Court of Arkansas held that Act 207 of 1937, Acts of Arkansas,

applied to the case at bar and that under said Act 207 of 1937 it was immaterial that *Stith* the owner of the lands involved herein was not made a party to the proceedings and that notice to *Smith* was binding upon *Stith* and that the notice of the sale of said lands did not name anyone as the owner of said lands and did sufficiently describe the lands to be sold, but, that the defects were cured by the confirmation of said sale. Upon this set of facts the following questions, which are closely interwoven and related, are presented:

1. That Act 207 of 1937, Acts of Arkansas, violates the due process clause of the 5th and 14th Amendments to the Constitution of the United States in that said Act 207 does away with the necessity of notice to landowners and makes it immaterial that the owner of lands be made a party to foreclosure proceedings in municipal improvement districts and permits the taking of lands without notice and without due process of law.

2. The application of Act 207 of 1937, Acts of Arkansas, to the case at bar violates the due process clause of the 5th and 14th Amendments to the Constitution of the United States because the foreclosure proceedings attacked in the case at bar was pending at the time said Act was enacted and said Act changed the basic nature of the proceedings from one not in rem to one in rem.

3. The lands of James H. Stith were taken in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States because *Stith* was not made a party to the foreclosure proceedings wherein his lands were foreclosed and sold, *Stith* did not have his day in court, *Stith* did not have any notice of said proceedings even though the Commissioners of Sewer Improvement District 94 knew from their own records his correct name

and correct address, notice to *Smith* is not notice to *Stith*, and notice to *Smith* is not binding upon *Stith*.

4. The notice of the sale of the lands in the case at bar did not name anyone as the owner and did not sufficiently describe the lands to be sold and constituted no notice whatsoever and said want of notice constituted the taking of appellants lands without notice in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

5. The application of Act 207 of 1937, Acts of Arkansas, to the case at bar without taking into consideration the prior laws, on the same express subject which have not been repealed, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The Supreme Court of Arkansas erred in failing and refusing to consider these prior laws in construing said Act 207 of 1937. The prior laws the Supreme Court of Arkansas failed to consider are: Act 85 of 1925, Acts of Arkansas, and Sections 5677, 5678, 5679 and 5700, Crawford & Moses Digest of the Statutes of Arkansas.

6. The holding of the Supreme Court of Arkansas that there was no evidence in the record to show that James H. Stith had attempted in good faith to redeem his lands during the period of redemption, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The record affirmatively shows that a redemption certificate was issued during the period of redemption and that for some reason due to the carelessness of the clerk the tax for the year 1934 was omitted and that all prior and subsequent taxes were paid. The evidence contradicts the findings and holdings of the Supreme Court of Arkansas.

7. The holding that appellants are barred under the rule of stare decisis by the decision in the case of *Pinkert* v.

Lamb, 215 Ark. 879, is in error and in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Appellants were not parties to the action in the case of *Pinkert* v. *Lamb,* 215 Ark. 879 even though their lands were involved in that action, appellants did not have their day in court in said cause.

All other points of law and questions set forth in the Assignment of Errors are also presented.

Statutes Involved

Act 207, Acts of Arkansas 1937; Act 85, Acts of Arkansas 1925; Sections 5677, 5678, 5679 and 5700, Crawford & Moses Digest of the Statutes of Arkansas; and Amendment 5 and Amendment 14, Section 1, Constitution of the United States, are set forth in Appendix D attached hereto.

Statement

James H. Stith, father of plaintiffs-appellants herein, purchased the lands involved herein, the west half of Lots 1, 2, 3, 4, 5, and 6, Block 8, Adams Addition to the City of Little Rock, Arkansas, in 1902, built his home on said lots, and raised his family there, and lived on said property until his death in 1942. He left surviving him three children, Herbert Stith, James H. Stith, Jr., and Melanie Stith Tabor, plaintiffs-appellants herein, and a widow, Ella Stith who is the mother of one of the appellants herein and stepmother of the other two appellants herein. Ella Stith, widow of James H. Stith, deceased, remained in possession of the homeplace, hereinabove described, until she was dispossessed by and through the mandate of the Supreme Court of Arkansas in the case of *Pinkert* v. *Lamb,* 215 Ark. 879, opinion rendered October 17, 1949. Plaintiffs-appellants moved away from the State of Arkansas over 20 years ago and are and have been non-residents of the State of Ar-

kansas since that time. Plaintiffs-appellants were not parties to the ejectment suit which dispossessed Ella Stith, *Pinkert* v. *Lamb,* 215 Ark. 879, and had no notice, either actual or constructive, of the pendency of said action.

Defendants-appellees, Ed Pinkert and Manie Schuman, acquired title to the lands involved herein from W. I. Stout, Trustee, who acquired title to same by virtue of a deed from H. S. Nixon, Commissioner, appointed by the Chancery Court to sell same for Sewer Improvement District 94 as the result of a foreclosure decree in 1937 wherein said lands were sold to the District in 1938 for the tax due for the year 1934 in the sum of $2.18 tax and $0.44 penalty. The Home Owners Loan Corporation, mortgagees of James H. Stith, redeemed the lands involved herein in 1934 from Sewer Improvement District 94 for all prior taxes due the District and again redeemed said lands in 1939 for all prior taxes due said District, but for some reason apparently due to the mistake, carelessness or misprision of the clerk the 1934 tax was not included in the redemption certificate. The foreclosure decree foreclosing the lands involved herein for the 1934 tax due Sewer Improvement District 94 was rendered in 1937 on a complaint filed in 1935, in case No. 37177, Chancery Court of Pulaski County, Arkansas.

Plaintiffs-appellants filed this suit against Ed Pinkert and Manie Schuman, defendants-appellees herein, and against Robert W. Griffith, Jr., W. I. Stout, Trustee, Ella Stith, L. E. Ellenbogen, and Louis C. Cohen, doing business as The Elco Agency, rental agents of Ella Stith, and Board of Improvement of Sewer Improvement District No. 94 of the City of Little Rock, Arkansas. Plaintiffs-appellants alleged and proved among other things that the complaint, warning order and decree in the case No. 37177, Pulaski Chancery Court, wherein the lands involved herein were sold to Sewer Improvement District 94, did not name *James*

H. Stith as a party defendant at any time, but instead *James H. Smith* was named as defendant in said proceedings; that *James H. Stith* was the last owner of record and that the tax records of Sewer Improvement District 94 showed the owner of the lands involved herein as being *James H. Stith* and also showing his correct address as being 2223 West 19th St., Little Rock, Arkansas; that *James H. Stith* was known in the community as owning and living upon the lands involved herein at aforesaid address; and that the notice of the sale of the lands involved herein did not name anyone as the owner of the lands to be sold and that the description of said lands, among other lands, was given in said notice of sale as follows: "The following described real estate to-wit: Lots 21, 22, Block 1, Lots 1 to 6, inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6. West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition" (R. 68) (also see Appendix A). In addition to alleging and proving the above facts, plaintiffs-appellants attacked said proceedings as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States for the reason that *James H. Stith* was not a party to said proceedings, did not have his day in court, had no notice of said proceedings, *Notice to Smith* is not *Notice to Stith*, and that the notice of the sale did not name any person as the owner of said lands and the description of the lands in said notice was insufficient and jumbled in such a way that one could not tell from the notice what lands were to be sold and constituted no notice whatsoever. The Chancery Court held the sale to be valid (Appendix C). Plaintiffs-appellants appealed to the Supreme Court of Arkansas where this cause was tried de novo. The Supreme Court of Arkansas affirmed the decision of the Chancery Court. Plaintiffs-appellants specifically attacked the validity of Act 207,

Acts of Arkansas 1937, as being unconstitutional in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States and attacked the application of said Act 207 to the case at bar for the same reasons on the same federal grounds at every step of the proceedings. Defendants-appellees pleaded res judicata, estoppel, and collateral attack. The Supreme Court of Arkansas held that res judicata was not in the case, that Act 207, Acts of Arkansas 1937, was valid and held that said Act did not offend the Constitution of the United States, that under said Act that it was immaterial that James H. Stith was not made a party to the foreclosure proceedings, that the defects in the notice of the sale of the lands involved herein were cured by the confirmation of said sale, that under said Act 207 of 1937, notice to *Smith* was binding upon *Stith,* that appellants were barred by stare decisis under the decision of *Pinkert* v. *Lamb,* 215 Ark. 879, and that there was no evidence that James H. Stith had attempted to redeem his lands, the redemption certificate was not evidence of that fact. The Supreme Court of Arkansas was in grave error. (Appendix A.) In addition to the lands there is over $1000.00 in accrued rents involved in this action (R. 3). Also see R. 77.

The Questions Are Substantial

The issues in this appeal are of vital importance to all the property owners in all municipal improvement districts in the entire State of Arkansas. Act 207, Acts of Arkansas, 1937, Section 2, providing that it shall be immaterial that the ownership of the lands to be foreclosed upon be incorrectly alleged in the proceedings and providing for constructive service upon residents as well as non-residents and the application of said Act by the Supreme Court of Arkansas and the holding by said Court that confirmation of the sale

of lands in such proceedings cures all defects in the notice of the sale, certainly threatens the fundamental rights of the land owners in municipal improvement districts in the entire State of Arkansas. Every citizen of the United States is entitled to notice that his lands are to be sold, and is entitled to his day in court before his lands are taken from him and any statute and any rule or decision of any court to the contrary violates the due process clause of the 5th and 14th Amendments to the Constitution of the United States. There are several other suits pending in the lower courts in Arkansas involving these same questions. The issues in this appeal are of importance to the administration of justice in the courts of Arkansas in municipal improvement district foreclosure proceedings. Plaintiffs-appellants are colored people without much education and need the protection of the courts. The issues in this appeal are of sufficient public interest to justify the Supreme Court of the United States in taking jurisdiction on appeal and to merit the full consideration of the Supreme Court.

1. Act 207, Acts of Arkansas 1937, page 758, plainly shows the intention of the legislature in its preamble which in short states that it is an Act to amend and supplement the law governing the foreclosure of liens for assessments due in municipal improvement districts. (Appendix D.) Section 8 of said Act 207 is as follows:

> "Section 8. This act is intended to supplement the laws now in force relative to foreclosure of assessment liens in municipal improvement districts, and the service by notice as herein provided shall be just as effective and binding on the property as though service was had under Section 5677 and 5679 of Crawford and Moses Digest of the Statutes of Arkansas."

Section 9 of said Act 207 is as follows:

> "Section 9. This act is declared to be severable and if any part hereof should be invalid it shall not affect the remainder of this act. This Act is to be cumulative and shall repeal only those Acts in direct conflict herewith."

Thus taking the provisions of the Act itself it is easily shown that the legislature intended that the Act be in addition to the laws in existence at the time of its enactment. Cumulative and supplemental means something in addition thereto. Thus it is contended by plaintiffs-appellants that said Act 207 is not retroactive as so held the Supreme Court of Arkansas in the case at bar, but on the contrary, said Act 207 applies to suits filed after its enactment and should be read in conjunction with and together with the laws in existence at the time of its enactment and does not apply to suits pending at the time of its enactment.

The Supreme Court of Arkansas read Act 207, Acts of Arkansas, 1937, as standing alone, and the pertinent part the Court relied upon in thus construing the law in the case at bar is as follows:

> "Section 2. * * *. Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant. * * * "

The portions of Section 2, Act 207 of 1937, omitted are not relevant to the issues in this appeal. The omitted parts of this section provide in brief that the suit to enforce the collection of past due assessments be brought in the Chancery Court of the County in which the improvement district is

situated and that if a building occupies more than one lot or tract of land, the property may be listed together on one line.

Section 3, Act 207, Acts of Arkansas 1937, provides that notice of the pendency of the suit shall be by warning order to be published weekly for four weeks and sets out the form of the warning order to be used, and provides that the name of each *supposed owner* be set opposite his or her land (Appendix D).

Section 4, Act 207, Acts of Arkansas 1937, in brief provides that judgment shall be given after notice of the pendency of the action had been published as provided in Section 3, that after judgment a commissioner be appointed and directed to sell the lands after having first advertised such sale in some newspaper published in the County weekly for two consecutive weeks and that the publication may include all the lands described in the decree (Appendix D). This section does not make any provision as to naming the owner of the lands in the notice of the sale to be had, nor does it set out the form of notice to be used, it just provides for a two weeks notice of the sale and that it shall describe the lands in the decree to be sold.

The issues involved in this appeal as to the above parts of Act 207, Acts of Arkansas 1937, are clearly defined. The Supreme Court of Arkansas held in the case at bar that it was immaterial whether or not *Stith,* the owner of the lands involved herein, was named in the complaint, warning order and decree; that the naming of *Smith* in the complaint, warning order and decree was binding on *Stith* and that notice to *Smith* was notice to *Stith* for the reason that said Act 207, Acts of Arkansas 1937, applied to the case at bar and that under said Act 207 it was immaterial that the ownership of the land be incorrectly alleged; and that even assuming that the description of the

lands in the notice of the sale was insufficient that such defect was cured by the confirmation of the sale; and that Act 207 of 1937 did provide that the owner of the lands to be sold should be named. The Supreme Court of Arkansas was gravely in error. By thus construing said Act 207 of 1937 as standing alone without reading it in conjunction with the laws in existence on the same express subject, the Court placed a construction on said Act 207 that is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. (For the opinion of the Supreme Court of Arkansas see Appendix A). The effect of the decision in the case at bar is to make it unnecessary under Act 207, Acts ofArkansas 1937, to make any owner of any land in any municipal improvement district foreclosure proceedings a party to the proceedings, unnecessary to name the owner in the warning order correctly or incorrectly, and unnecessary to name the owner in the notice of the sale, and unnecessary to properly describe the lands to be sold in the notice of the sale. In plain words the Court in effect held that it was unnecessary to give any notice to the owner of lands that his lands were to be taken and sold for assessments past due in municipal improvement district foreclosure proceedings. The Supreme Court of Arkansas is in grave error. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party and no sale of a persons land arising out of such judgment is valid and neither is such sale valid when such sale was had upon a notice that constituted no notice at all. **The Chancery Court**, in the proceedings wherein appellants lands were foreclosed and sold, had no jurisdiction to render such judgment because *Stith*, the owner of said lands, was not a party to the proceedings, had no notice of the proceedings, and the notice of the sale

of same based upon said judgment did not name anyone and did not sufficiently describe the lands to be sold, thus *Stith's* lands were taken without notice and said proceedings were not due process of law. The Supreme Court of Arkansas is gravely in error in upholding such proceedings and in construing Act 207, Acts of Arkansas 1937, as making such proceedings valid.

While the facts are different, the principles of law laid down in the case of *Moses H. Scott* v. *John H. McNeal*, et al, 154 U. S. 34, 45, 46, 47 (38 L. Ed. 896, 901, 902) apply to the case at bar in this appeal and *Mr. Justice* Gray, speaking for the Supreme Court:

> "The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia* (*"Virginia* v. *Rives"*) 100 U. S. 313, 318, 319 (25: 667, 669); *Ex parte Virginia*, 100 U. S. 339, 346 (25: 676, 679); *Neal* v. *Delaware*, 103 U. S. 370, 397 (26: 567, 574). And the first one, as said by *Chief Justice* Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554 (23: 588, 592), repeating the words of *Mr. Justice* Johnson in *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 244 (4: 559, 561); was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice'."
>
> Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the terri-

tory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attril*, 146 U. S. 657, 683, 684 (36: 1123, 1133); *Mobile & O. R. Co.* v. *Tennessee, ante*, p. 793.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by *Mr. Justice* Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (24: 565, 572).

Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves party to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The Mary*, 13 U. S. 9 Cranch, 126, 144 (3: 678, 684); *Hollinsworth* v. *Barbour*, 29 U. S. 4 Pet. 466, 475 (7: 922, 926); *Pennoyer* v. *Neff*, 95 U. S. 714, 727 (24: 565, 570). And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a for-

eign court of admiralty, for instance, in some cases, as observed by *Chief Justice* Marshall, "unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." *Rose* v. *Himely,* 8 U. S. 4 Cranch, 241, 269 (2: 608, 617). Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. *Thompson* v. *Whitman,* 85 U. S. 18 Wall. 457 (21: 897)."

One not a party to an action, nor notified of its pendency, is not bound thereby. *Hale* v. *Finch,* 104 U. S. 261 (26 L. Ed. 732).

Even in proceedings *in rem* one is not bound by a judgment unless he was a party or privy to the proceedings or unless he had notice of the proceedings and the facts and the questions of law are not res judicata. *Gratiot County State Bank* v. *Johnson,* 249 U. S. 246 (63 L. Ed. 587).

It is not necessary to burden the Court with numerous citations on this question. The above cited decisions contain the principles applicable to the case at bar even though the facts are different. Needless to say, when *Smith* was named in the complaint, warning order and decree, *Stith* was not a party to the proceedings and *Stith* did not have notice of the pendency of the action wherein his property was foreclosed and sold. The notice of the sale named no one as the owner and did not describe the lands to be

sold in a way as to constitute notice. It is fundamental that notice to one person is not notice to another and it is equally fundamental that there cannot be any presumptions indulged in as to a question of constructive notice. There can not be any presumptions that the name of one person in a warning order is intended to be the name of another. Notice to *Smith* is not notice to *Stith* and *Stith* is not bound thereby. This precise question has been passed upon and settled by the Supreme Court of the United States in the case of *Marx* v. *Hanthorn*, 148 U. S. 172, 183, 184 (37 L. Ed. 410, 414) where the statutes of Oregon concerning sales of property for taxes required that a notice of the sale be published in the newspaper, but did not require that the name of the owner be given in the notice. In that case there was a publication as notice of the sale and the notice listed the name of *Ida J. Hawthorn* as the owner of the lands to be sold. The lands actually belonged to *Ida J. Hanthorn* and the court held that the notice must give the name of the owner and the notice to *Hawthorn* was not notice to *Hanthorn* and the decision of the state court was affirmed. This was the decision of the Supreme Court of the United States even though the statute did not require the naming of the owner of the lands to be sold. A fortiori, in the case at bar notice to *Smith* is not notice to *Stith* even though the statute, Act 207, Acts of Arkansas 1937, did not require that the notice of the sale name the owner of the lands to be sold. Naming *Smith* in the complaint, warning order and decree, was not notice of the pendency of the action to *Stith*. *Mr. Justice* Shiras speaking for the court in the case of *Marx* v. *Hanthorn*, 148 U. S. 172, 183, 184 (37 L. Ed. 410, 414) said:

> "This brings us to a consideration of the matters put in evidence by the defendant, going to overthrow the prima facie presumptions created by the tax deed.

There were two. The land in question was admitted to belong to Ida J. Hanthorn, and that fact was found by the court below; but on the delinquent tax roll the property is alleged to belong to Ida J. Hawthorn, and it further appears by the return of the Sheriff that the property was advertised and sold as the property of Ida J. Hawthorn.

It was the opinion of the court below that due and reasonable notice of the sale of property for a delinquent tax is necessary for the validity of such sale, and that the fair meaning of the Oregon statutes relating judicial sales and sales for taxes is that the name of the owner of the lands to be sold shall appear in the notice of the sale; and the court was further of the opinion that to give notice that the property of Ida J. Hawthorn was to be sold was not only not notice that the property of Ida J. Hanthorn was to be sold, but was actually misleading, and that such want of notice or misleading notice vitiated the sale.

It is contended, on behalf of the plaintiff, that the statute does not require that the notice should name the owner or name him correctly; that it is sufficient to correctly describe the property which is to be sold; and that at any rate, the notice in the present case was sufficient within the meaning of the rule of *idem sonans.*

We agree with the court below in thinking that the reasonable meaning of the statutes regulating notices and sales of property for taxes, is that such notice and advertisement should give the correct names of those whose property is to be sold. While the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption, and the present case shows that such was the construction adopted by the officials, as they did name, though incorrectly, an owner in the notice."

And in conclusion the Supreme Court of the United States, in the case of *Marx* v. *Hanthorn,* 148 U.S. 172, 185 (37 L. Ed. 410, 414), supra, on this express question, said:

"As, however, we think that the court below did not err in permitting the defendant to impugn the tax title by showing that the name of the owner was wrongly given in the delinquent tax roll, and in the notice and publication, and in holding the sale was thereby invalidated, it follows that its judgment should be affirmed."

In the case at bar, we think that the rules set out above apply to the questions in this appeal. Here the Supreme Court of Arkansas held that under the provisions of Act 207, Acts of Arkansas 1937, that it was immaterial if the name of the owner was incorrectly stated in the proceedings and that the notice of the sale did not have to name anyone as the owner, because the Statute did not require it to be done, and that an incorrect description in said notice did not render the sale invalid, because confirmation of same cured those defects (Appendix A). The Supreme Court of Arkansas is clearly in error. A person must have some notice that his land is to be sold and if not given proper notice then the sale is had without due process of law and is void and nothing can cure such a sale. It makes no difference if the sale is one for taxes by virtue of a judicial sale or if the sale is by an administrative officer, it still is a tax sale and before a persons property can be validly sold for taxes he must be given notice of the proceedings and of the sale so that he can protect his rights in his property. We submit that the decision in the case at bar should be reversed and remanded with directions to cancel the tax deed of defendants-appellees.

As to another decision on this particular question see the case of *Virginia and West Virginia Coal Co.* v. *Charles*, 251 Fed. 83, where the court held that notice to *Robert Smith* that his land was to be sold for taxes was not notice to *Richard Smythe* and that the sale of same was void.

2. In construing Act 207, Acts of Arkansas 1937, the Supreme Court of Arkansas construed said Act as standing alone and thus placed a construction upon the Act that renders said Act invalid as being in violation of the due process clause of the 14th Amendment to the Constitution of the United States. The prior laws which the court overlooked are set out below:

CRAWFORD AND MOSES DIGEST OF THE STATUTES OF ARKANSAS

"Section 5677. Name of last Owner. In suits to foreclose the liens of assessments upon property in such improvement districts the name of the last owner of the property as it appears in the recorder's office shall always be given as the owner, and such party shall be made defendant, unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made the defendant. Act March 3, 1913, p. 527, # 4.

Section 5678. Default decree. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and cost and an attorney's fee. Act March 22, 1881, p. 161, # 10.

Section 5679. Constructive service. If the sheriff, or other officer, to whom the writ may be directed, shall return that the defendant is not to be found in his county, or if the owner is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for fifteen days, and by publishing a copy of the summons in some daily or weekly paper, published in the city, for one insertion, and the cause shall be made ready for hearing within fifteen days after such publication, and a decree shall be rendered as in actual service. Id. # 10.

Section 5700. Terms of sale. All sales shall be for cash, and to the highest legal bidder. If sales are not completed on the first day, the commissioner shall continue the same day to day until completed. In other respects such sales shall be governed by the rules and laws regulating other sales of land made under decrees in chancery, and with like notice. Id. # 25." See Appendix D.

Act 85, Acts of Arkansas 1925, Section 1, the portions applicable provides in brief that the collector shall make a delinquent list and the list shall include the name of the owner as the same appears on the tax books. Section 6, provides that when the board of commissioners file suit for the collection of delinquent taxes that a certified copy of the delinquent list shall be filed with the complaint. (Appendix D)

The preamble of Act 207, Acts of Arkansas 1937, expressly states that the act is to amend and supplement the laws now in force. Section 8 provides that the act is to be supplemental to the laws now in existence and that service under this act shall be just as effective and binding as though had under Sections 5677 and 5679 Crawford and Moses Digest of the statutes of Arkansas. Section 9 provides that the act shall be cumulative and shall repeal only those acts in direct conflict herewith. Section 3 provides for service by warning order and that the supposed owner shall be named therein. Section 2 provides that it shall be immaterial if the ownership of the lands be given incorrectly alleged in the proceedings. (Appendix D). The compiler of the — evidently meant section 5678 instead of 5677 Crawford & Moses Digest of the Statutes of Arkansas because section 5677 does not deal with service of process at all while the former section does. Be that as it may, When an Act of the legislature by it own express provisions is supplemental and cumulative, it certainly is

not retroactive and does not apply to suits pending at the time of its enactment. A statute is never retroactive unless expressly made so by its own provisions. Act 207 of 1937 by its own terms is not applicable to the foreclosure suit attacked in the case at bar, said foreclosure suit being filed in 1935 two years before said Act 207 was passed and service attempted after said Act was passed.

The basic law was changed as to foreclosure of lands for taxes in municipal improvement districts. At the time the foreclosure suit was filed the law required the last owner of record to be made a party defendant and provided for personal service of process and Act 207 of 1937 provides for service by warning order and that it is immaterial that the owner be named correctly or incorrectly in the proceedings. The proceedings before the enactment of said Act 207, were proceedings quasi in personam and quasi in rem, quasi in personam in that the suit was against a certain defendant, the owner of the land as shown by the records, and quasi in rem in that only the lands involved should be held for the tax and no other land of the defendant. After enactment of Act 207 of 1937 the nature of the proceedings were changed to one strictly in rem. Thus the application of said Act 207 of 1937, Acts of Arkansas, to the case at bar is an error and the Supreme Court of Arkansas by applying said Act 207 to the case at bar took appellants lands in violation of due process of law in violation of the 5th and 14th Amendments to the constitution of the United States. By necessary intendment of the legislature determined from reading and studying the prior laws is that the legislature still intended that the owner of the lands be made a party to the proceedings and be given notice of same; the officials thought so or else no one would have been named in the warning order. Thus it is seen that the Supreme Court of Arkansas erred in

applying Act 207, Acts of Arkansas 1937 to the case at bar.

3. As to the other questions presented, as stated in the assignment of errors, and set out therein, they are expressly reserved even though not discussed at length. In passing we say that when the Supreme Court of Arkansas has held in two recent cases, *Word, Receiver* v. *Grigsby*, 206 Ark 164 and *Schuman* v. *Person*, 216 Ark 732, that one could complete a redemption of his land in improvement districts where he had made a partial redemption or had attempted in good faith to redeem his lands and was prevented from doing so by the error of the clerk; and then held in the case at bar that the redemption certificates were not evidence that a redemption had been attempted in good faith; and that in the face of the redemption certificates showing that all the prior and subsequent taxes had been paid except for the year 1934; certainly said decision came as a surprise and constitutes the taking of appellants lands in violation of his constitutional rights. One is not presumed to do a vain thing. Why would a man redeem for all prior and subsequent taxes, subsequent to the sale and yet knowingly leave out the tax for one year? No person would do that knowingly.

As to stare decisis, the Supreme Court of Arkansas held that plaintiffs-appellants are barred by stare decisis under the decision of *Pinkert* v. *Lamb*, 215 Ark 879. The case just mentioned involved the same lands as is involved in this appeal, yet plaintiffs-appellants were not parties to that suit and the court held that they were not barred by res judicata. In *Pinkert* v. *Lamb*, supra, the court merely held Act 207 of 1937 Acts of Arkansas to be valid, so if the Act is valid and plaintiffs-appellants should lose this appeal then that decision is correct; but on the other hand

if the Act 207 of 1937 is invalid as claimed by appellants then both decisions are wrong and must fall, and the decision in that case as well as in the case at bar are both in error. Stare decisis has no place in this appeal. We submit that the court erred in such holding.

The Supreme Court of Arkansas relied upon the case of *Ballard* v. *Hunter,* 74 Ark 174, affirmed *Ballard* v. *Hunter,* 204 U. S. 241, 51 L. Ed. 461. In that case Ballard was a resident of Georgia and the Statute provided for personal service against residents of Arkansas and constructive service against non-residents of the State of Arkansas and was the Act creating the St. Francis Levee District by a special Act of the legislature. The Supreme Court of the United States held (see page 262 in the opinion, page 474 L.Ed.) that the proceedings were appropriate to the nature of the case. The facts are different in this case than those of the case at bar. There the owners were non-residents of the State of Arkansas; in the case at bar the owner was a resident of Arkansas and his correct address and correct name was known to the commissioners of the district. So the facts do not fit at all because had the owner in the Ballard case been a resident then personal service would have been required even under the special statute in consideration there. In the case at bar the statutes involved are the general laws of the State. We submit that the case of *Ballard* v. *Hunter,* supra has no application to the case at bar, and did not cover the precise questions that are involved in this appeal. While *Ballard* v. *Hunter,* 204 U. S. 241 and *Marx* v. *Hanthorn,* 148 U. S. 172, have both been cited with approval many times, the two cases do not conflict at all since the precise questions in both cases are different. *Marx* v. *Hanthorn,* supra, clearly applies to the case at bar and *Ballard* v. *Hunter,* does not apply at all. The cases are clearly distinguishable.

While the facts are different, the rule laid down as to notice in proceedings in rem in the case of *Griffin* v. *Griffin*, 327 U. S. 220, 90 L.Ed. 635, is correct and should be followed. There the Supreme Court held that notice by personal or constructive service cannot be dispensed with even in proceedings in rem with respect to property within the jurisdiction of the court.

It is submitted that the decision of the Supreme Court of Arkansas is in error in holding Act 207, Acts of Arkansas, 1937, to be valid, in error in holding that said statute applied to the case at bar, in error in its construction of the statute aforesaid, and in error in holding that notice to *Smith* is binding upon *Stith*. The decision of the Supreme Court of Arkansas should be reversed and remanded. If this decision is upheld then numerous land owners over the State of Arkansas face the risk of losing their lands without notice. We believe that the questions are, as presented in this appeal, substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. 9297

Opinion Delivered 11/13/50

HERBERT STITH, ET AL,

v.

ED PINKERT, ET AL.

PULASKI CHANCERY COURT DECREE AFFIRMING

EDWIN E. DUNAWAY, Associate Justice

For the second time the question of appellee Pinkert's title to the West ½ of Lots 1 to 6 inclusive, Block 8, Adams Addition to the City of Little Rock, Arkansas is before this court. The first case was *Pinkert* v. *Lamb*, 215 Ark. 879, 224 S. W. 2nd, 15.

In the *Lamb* case, the litigation was between Ed Pinkert and Ella Stith, widow of James H. Stith. Pinkert claimed Title through mesne conveyances from Sewer Improvement District No. 94 of Little Rock. The District had purchased the property at a commissioner's sale held pursuant to a decree of the Pulaski Chancery Court rendered November 23, 1937, condemning said lots to be sold for delinquent assessments for the year 1934. Ella Stith claimed in a collateral attack on the foreclosure decree and sale thereunder that they were void for various reasons.

We upheld the validity of the foreclosure sale of the property to the district in the former case and reversed the Chancellor's decree to the contrary. One day before the mandate was issued by this court in that case, the instant suit was begun by appellants herein, Herbert Stith, James H. Stith, Jr., and Melanie Stith Tabor, the surviving children and heirs of James H. Stith, deceased, who died in 1942. All three appellants are non-residents of the State of Arkansas and have been for many years.

The first action, later transferred to equity, had been begun as one in ejectment by Pinkert against John Lamb, alleged to be in possession of the property as tenant of James H. Stith. At the first trial it was stipulated that Ella Stith was the record title owner prior to the sale of the lots to the District and that she held possession through Lamb as tenant.

It now develops that Ella Stith had only a dower interest in the property and that appellants herein, owners of the fee as heirs-as-law of James H. Stith, had not been made parties to the first action. The stipulation had evidently been made by counsel under a misapprehension of the facts, in an effort to expedite trial of the cause when it was shown that James H. Stith was deceased.

In the instant case, the Stith heirs sought cancellation of Pinkert's deed and an accounting of the rents and profits from the property. They joined as defendants Pinkert and one Schuman, alleged to be tax-title speculators; the receiver of District No. 94 and the Board of Commissioners of said District; certain parties who had collected rents from the property; and Ella Stith, mother of one appellant and step-mother of the other two. Only Pinkert and Schuman answered or appeared.

The complaint alleged all the same grounds of invalidity of the foreclosure and sale as were presented in *Pinkert* v. *Lamb, supra,* together with certain new matters. It was alleged that the foreclosure decree was void because James H. *Smith,* rather than James H. *Stith,* had been named as owner in the complaint filed against the property by the District; and because this same mistake was made in naming *Stith* as the owner in the warning order or published notice of pendency of the suit. In addition to these two defects, which were alleged and proved in the *Lamb* case, it was alleged and proved that in the notice of the sale the property was described, but the name of the owner was omitted entirely. It was further alleged that the description in said notice of sale was so indefinite as to void the sale.

At the outset appellees contend that the judgment in *Pinkert* v. *Lamb, supra,* is *res judicata* of the present suit.

Appellants, on the other hand, contend that since they were not parties nor privy to the prior suit, the doctrine of *res judicata* is inapplicable and they are not bound by the former judgment. We agree that *res judicata* is not in the case, but the law as declared in the opinion in the *Lamb* CASE is controlling in the case at bar under the rule of *stare decisis.*

In the *Lamb* case we held that Act 207 of 1937 (Ark. Stats. 1947 20-441 et seq.) governed the procedure to be followed in the foreclosure suit brought by the District. Then it was urged and now appellants argue that Act 207 is violative of the due process clause of the U. S. Constitution, in making the foreclosure proceedings an action in rem against the lands, in providing for constructive service, and in providing that an incorrect allegation of ownership should be immaterial. In sustaining the constitutionality of the statute we fully discussed these questions in the *Lamb* case. We adhere to the views there expressed.

Appellants further argue that we erred in holding Act 207 applicable since the foreclosure suit was already pending at the time said act became effective March 8, 1937. Appellants argue that the statute should be construed to be applicable only to suits commenced after its enactment. The statute pertained only to the mode of procedure and did not create any new rights or take away any vested rights. "Practice and procedure include the mode of proceeding and the formal steps by which a legal right is enforced. Those words comprehend writs, summonses, and other methods of notice to parties as well as pleadings, rules of evidence and costs. Practice and procedure indicate the forms for enforcing rights as distinguished from the law which creates, defines and protects rights." *Duggan* v. *Ogden,* 278 Mass. 432, 180 N. E. 301, 82 A.L.R. 765. As stated by this court in *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653 (at p. 1039): "The rule established by this court is that statutes in regard to remedies in procedure may be construed to apply to all pending proceedings, and will be so applied unless the language of the statute indicates a contrary intention." There is no such language in Act 207.

We adhere to our decision in the *Lamb* case in holding Act 207 of 1937 applicable to this foreclosure proceedings.[1]

As discussed fully in the *Lamb* case, the misspelling of *Stith* as *Smith* in the complaint and warning order did not render void the foreclosure decree of the Chancery Court of November 23, 1937. Section 2 of Act 207 (Ark. Stats. 1947. 20-441) which prescribed the procedure for enforcing collection of delinquent assessments by sale of the delinquent lands contains this provision: "Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall be immaterial that the ownership of the said lands . . . be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant." Validity of a similar statutory provision was sustained by this court in *Ballard* v. *Hunter,* 74 Ark. 174, 85 S.W. 252, affirmed by the Supreme Court of the United States in *Ballard* v. *Hunter,* 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461.

To hold that the obvious clerical error in misstating the name Stith rendered the decree void, would render the quoted statute meaningless. There is no contention made nor anything in the record in the instant case to indicate that there was such a person as James H. Smith, or that Stith and his heirs were in any way mislead by this mistake in the complaint and warning order.

We turn now to a consideration of appellants' contention that failure to name the owner in the published notice of sale rendered the sale void. As already pointed out, the challenged proceeding was one in rem against the property. Section 4 of Act 207 (Ark. Stats. 1947, Sec. 20-444) providing for publication of notice of sale contained no requirement that the owner or supposed owner be named. Certainly, if an erroneous allegation of ownership is immaterial in the complaint and warning order omission of the owner's name in the notice of sale would not be a fatal defect.

As to notice of sale, appellants also argue that the following description used therein was indefinite and confusing:

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[1] As pointed out in the *Lamb* case, Act 207 of 1937 was subsequently amended by Act 130 of 1939 and Act 195 of 1949, which are inapplicable to the case at bar.

"The following described real estate to-wit: Lots 21, 22, Block 1, lots 1 to 6, inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6, West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition".

It should be noted that challenged description appeared in the notice of sale and not in the complaint, warning order, or decree of foreclosure. The description used in the earlier steps of the proceeding was as follows: West ½ of lots 1-6, incl., Block 8, Adams Addition". Sufficiency of that description was upheld in the *Lamb* case. While a majority of the court is of the opinion that the description in the notice of the sale was sufficient, appellants cannot prevail even assuming its insufficiency. Such a defect was cured by the decree of the Chancery Court confirming the sale.

This court held in *Stout* v. *Brown*, 64 Ark. 96, 40 S.W. 701, that a sale of attached property under a writ *venditioni exponas*, after it had been reported to and confirmed by the court, could not be collaterally attacked upon the ground that such writ did not specify the property to be sold, or that the officer sold without authority, or that he sold without giving the notice required by law. The *Stout* case was cited with approval in *Lambie* v. *W. T. Rawleigh Co.*, 178 Ark. 1019, 14 S.W. 2nd, 245. In the latter case *Cassady* v. *Norris*, 118 Ark. 449, 177 S.W. 10, was also discussed in this language: (at p. 1029) "The court further held that, after a confirmation of a sale has been made by order of the court, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity." In *Glasscock* v. *Glasscock*, 98 Ark. 151, 135 S.W. 835, it was held that confirmation of a judicial sale of lands cures such irregularities as a failure to advertise the lands. See also *Files* v. *Harbison*, 29 Ark. 307, upholding a judicial sale of lands against a collateral attack, where part of the lands had been omitted from the notice of sale.

Appellants have also sought to bring themselves within the rule announced by this court in such cases as *Word, Receiver* v. *Grigsby*, 206 Ark. 164, 174 S.W. 2d, 439, and

Schuman v. *Person*, 216 Ark. 732, 227 S.W. 2d, 160. It is argued that James H. Stith sought to redeem the lots in question, but was prevented from doing so by the mistake or neglect of the official to whom he tried to pay the delinquent assessment. To establish this allegation in their complaint, appellants introduced in evidence two redemption certificates issued to the Homeowners Loan Corporation, which held a mortgage on the property. One certificate was issued in 1934 covering delinquencies for several previous years; the other was issued in 1938 for delinquent 1937 assessment. No other proof was offered on this issue. Mere proof of two redemptions on other occasions certainly did not prove that as to 1934 delinquency, James H. Stith attempted in good faith to pay his taxes and was only prevented from doing so by official misprision.

Even though the foreclosure sale was valid, James H. Stith and his heirs had five years from the date of the sale on March 16, 1938 in which to redeem the property. Ark. Stats. 1947. Secs. 20-446, 20-1144. The record does not disclose that they made any effort to do so.

We will not discuss at length appellants' allegation that Pinkert's title was acquired through fraud and collusion. Suffice it to say there is no proof whatever to sustain such allegations.

All other arguments of appellants have been considered and are deemed to be without merit.

The decree is affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF ARKANSAS

No. 9297

HERBERT STITH, ET AL, Appellants

VS.

ED PINKERT, ET AL, Appellees

MOTION TO REHEAR

Come the appellants and move the court to set aside the decree herein rendered affirming the decision of the Pulaski Chancery Court and to grant the appellants a rehearing, and for all other proper and equitable relief, and for cause for rehearing the appellants allege that the court erred in their rulings of the law as hereinafter set out, and that the court overlooked the facts as hereinafter set out.

1. The court erred in holding that appellants were barred under the rule of stare decisis and by said error the court's holding is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Appellants did not have their day in court and this court's ruling that they are barred under the rule of stare decisis constitutes the taking of appellants lands without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States.

2. The court erred in holding that Act 207 of 1937 of the General Assembly of Arkansas did not violate the due process clause of the 5th and 14th Amendments to the Constitution of the United States; said holding of this court that the incorrect allegation of ownership and not making the true owner a party to the proceedings, under Act 207 of 1937 in municipal improvement district foreclosure proceedings, is immaterial, is in violation of the due process clause of the 5th and

14th Amendments to the Constitution of the United States, James H. Stith, the true owner and last owner of record, not having been made a party to the proceedings wherein Sewer Improvement District 94 foreclosed and sold his lands, thus not having his day in court.

3. The court erred in holding Act 207 of 1937 applicable to the case at bar since the foreclosure suit was pending at the time of the passage of said Act by the legislature; said Act 207 changed the law existing at its passage from a proceeding quasi in personam to a proceeding strictly in rem; and the holding of this court that said Act 207 of 1937 applied to the case at bar is in violation of the due process clause of the Constitution of the United States under the 5th and 14th Amendments to same in that it takes appellants land without due process of law. James H. Stith not having notice of said proceedings in said foreclosure suit.

4. James H. Stith not having been made a party to the proceedings, wherein Sewer Improvement District 94 foreclosed and sold his lands, and having no notice of same, did not have his day in court and said proceedings took his land without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States; and the court erred in holding that it was unnecessary that the owner be made a party to such proceedings and that notice to "SMITH" was notice to "STITH" and the court further erred in holding that same did not violate the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

5. The notice of the sale of the lands involved herein did not sufficiently describe the lands and did not show the name of the owner thereof and did n. t constitute notice at all that the lands of James H. Stith were to be sold. The court erred in holding that such want of notice was cured by confirmation of the sale; said want of notice and the holding of this court as to same both constitute the taking of appellants land without due

process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

6. The sale of the lands involved herein by Sewer Improvement District 94, through the Commissioner appointed to make said sale, after a redemption certificate had been issued, which due to the carelessness and negligence or misprision of the clerk in leaving out the tax due for the year 1934, said redemption certificate having been issued during the period of redemption and said redemption or partial redemption having been made in good faith under the belief that same was for all the taxes due on said lands, constituted the taking of appellants lands without due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. This court erred in holding that the record did not disclose any effort to redeem said lands and by said holding appellants lands were taken in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

7. The court overlooked the fact that there was no written assignment of the certificate of purchase from Jack Barry to W. I. Stout, Trustee and that W. I. Stout, Trustee acquired no title because a deed based upon an oral assignment (if any) is void as being in violation of the statute of frauds. Said deed to W. I. Stout, Trustee, being based upon an oral assignment of owning the certificate of purchase, there being no written assignment of same at all, being in violation of the Statute of Frauds and the courts upholding same by overlooking these facts constituted the taking of appellants lands in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

8. The court erred in construing Act 207 of 1937 of the general Assembly of Arkansas and the court overlooked the rules of statutory construction in construing said Act 207 of 1937 without considering the

prior laws on the same express subject and which have not been repealed, to determine the intention of the legislature in passing said Act 207 of 1937; and by overlooking the rules of statutory construction and thus by not considering aforesaid prior laws, namely Act 85 of 1925, Crawford and Moses Digest, Sections 5677, 5678, 5679 and 5700 inclusive, along with Act 207 of 1937, this court by such error upheld the taking of appellants land without due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; appellants' father, James H. Stith, never having had his day in court and never having any notice of the foreclosure proceedings wherein his land was sold. The court by said errors in construing Act 207 of 1937 took the lands of appellants without due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

I, Tilghman E. Dixon, one of the Attorneys for the appellants, state that I have read and studied the opinion carefully and have re-read the transcript and verily believe that the court in its rulings of law overlooked the facts mentioned and this Motion is not filed for the purpose of delay, and that the judgment should be set aside and a rehearing had, and respectfully so pray.

Respectfully submitted,

(signed) TILGHMAN E. DIXON.

SUPREME COURT OF ARKANSAS

November Term, 1950

December 11, 1950

REHEARING PETITIONS DENIED: Being fully advised, the petitions for rehearing in the following causes are by the Court severally overruled: * * * 9297—Herbert Stith, et al, Appellants vs Ed Pinkert, et al Appelles; * * *

APPENDIX "C"

PULASKI CHANCERY COURT

No. 87577

HERBERT STITH, ET AL, Plaintiffs,

vs.

ED PINKERT, ET AL, Defendants.

DECREE

On this day came on for hearing the above entitled cause, the plaintiffs appearing by their attorneys, Tilghman E. Dixon and J. R. Booker; the defendants Ed Pinkert and Manie Schuman appearing by their attorney U. A. Gentry; and the defendants Robert W. Griffith, Jr., W. I. Stout, Ella Stith, L. E. Ellenbogen and Louis C. Cohen, d/b/a Elco Agency, and Board of Improvement of Sewer Improvement District No. 94 of the City of Little Rock, Arkansas came not, neither did they answer, plead or demur; and this cause is submitted to the Court upon the complaint of plaintiffs and the demurrer thereto on the part of Ed Pinkert and Manie Schuman; the separate answer of Ed Pinkert and Manie Schuman; the reply of plaintiffs to the answer of the defendants Ed Pinkert and Manie Schuman; the depositions of the plaintiffs Herbert Stith, James H. Stith, Jr., and Melanie Stith Taylor; the testimony of Frank Kell, W. A. Johnson and L. C. Cockman, witnesses for the plaintiffs, taken orally before the Court (which testimony was committed to writing by the official court reporter and is hereby ordered to be transcribed and filed as a part of the record in this cause); certified and exemplified records introduced as exhibits; and the Court being well and sufficiently advised as to the matters of fact and law arising herein, doth find the issues in favor of the defendants.

The Court finds that all right, title and interest of the plaintiffs in and to the West Half of Lots One (1), Two (2), Three (3), Four (4), Five (5) and Six (6), Block

Eight (8), Adams Addition to the City of Little Rock, Arkansas, were vested in Sewer Improvement District No. 94 of the City of Little Rock, Arkansas by virtue of a foreclosure decree and sale in the case of Board of Commissioners of Sewer Improvement District No. 94 vs. S. R. Thomas, et al. (No. 37177) in the Chancery Court of Pulaski County, Arkansas, (the property not having been redeemed within the time provided by law), and that the defendant herein Ed Pinkert, is now the owner of said property through mesne conveyances from said improvement district. Plaintiffs' cause of action is therefore without equity and should be dismissed.

It Is Therefore considered, ordered, adjudged and decreed that plaintiffs' complaint be dismissed for want of equity, and that the defendants Ed Pinkert and Manie Schuman have judgment for all their costs herein expended, for which execution may issue as upon a judgment at law.

Plaintiffs except to the findings and decree of the Court and pray an appeal to the Supreme Court of Arkansas, which is granted.

FRANK H. DODGE,
Chancellor.

Date: May 4, 1950.

O K as to form, Tilghman E. Dixon, U. A. Gentry.

(Filing stamp: "May 4, 1950".)

APPENDIX "D"

ACTS OF ARKANSAS, 1937

Page 758.

Act 207

An act to amend and supplement the law governing the foreclosure of liens for assessments due in municipal improvement districts, and other purposes.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. That any assessment, or annual installment thereof, levied by a Municipal improvement district shall not be paid within the time provided by the City Ordinance approving such assessment, the said collector shall add thereto a penalty of ten per centum, and shall at once return a list of all the property within such improvement district on which the assessment, or installment, has not been paid to the board of improvement as delinquent.

Section 2. On receipt of such delinquent list the board of commissioners shall enforce collection of such past due assessments by proceedings in the Chancery Court of the County in which said improvement district is situated; and said court shall give judgment against said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, for the amount of such taxes or assessments, together with the penalty and interest on same, attorneys fees and costs of the proceedings. Such judgment shall provide for the sale of said delinquent lands by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant. In listing said lots, blocks, or parcels of land, railroad tracks and right-of-way, the property may be shown as a single improvement; that is, if a building occupies more than one lot or tract of land, the property may be listed together on one line.

Section 3. All of the delinquent property in such improvement district may and should be included in one suit, and such suit may cover more than one past due installment. The warning order or notice of the pendency of such suit shall be given by publication weekly for four weeks before judgment is entered for the sale of said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, in some newspaper published in the county where such suits

may be pending, which warning order or notice may be in the following terms:

BOARD OF COMMISSIONERS, (and name of improvement district)

Plaintiff

vs.

DELINQUENT LANDS, LOTS, BLOCKS, OR PARCELS OF LAND, AND RAILROAD TRACKS AND RIGHT-OF-WAY, IN SAID DISTRICT,

Defendants

All persons, firms, or corporations having or claiming an interest in any of the following described lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, are hereby notified and warned that suit is pending in the Chancery Court of ..... County, Arkansas, to enforce the collection of certain ..... taxes or assessments on the subjoined list of lands, each supposed owner having been set opposite his or her or its lands, together with the amounts severally due from each, to-wit:

(Then shall follow a list of supposed owners, with a description of each separate property that is delinquent, and amount due thereon respectively as aforesaid), and said warning order or notice may conclude in the following form:

All persons, firms and corporations interested in any of said property are hereby warned and notified that they are required by law to appear within four weeks and make defense to said suit, or the same will be taken for confessed and final judgment will be entered directing the sale of said lands for the purpose of collecting said taxes or assessments, together with the payment of interest, penalty, attorney's fee and costs adjudged against each tract.

— —,

Clerk of said Court.

Section 4. And said suit shall stand for trial at the first term of court, or adjourned day of court, after the complaint may be filed, if said four weeks shall expire either be-

fore the first day of the term, or during the term of court to which said suits are brought respectively, unless a continuance be granted for good cause shown, within the discretion of the court, and such continuance, for good cause shown, may be granted as to a part of said lands or defendants without affecting the duty of the court to dispose finally of the others as to whom no continuance may be granted; and in all cases where notice has been properly given as aforesaid, and where no answer has been filed, or, if filed, and the cause decided for the plaintiff, the court by its decree, shall grant the relief as prayed for in the complaint, and shall direct said commissioner to sell the lands, lots, blocks, or parcels of land, railroad tracks and right-of-way described in the complaint at the courthouse door of the county wherein the decree is entered, at public outcry, to the highest and best bidder, for cash in hand, after having first advertised such sale (such advertisement may include all the different properties described in the decree) for two weeks, consecutively, in some newspaper published in the county, or if there be no such newspaper such advertisement may be published in some newspaper published in an adjoining county; and if all the lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be not sold on the day as advertised, such sale shall continue from day to day until completed; and such commissioner shall by proper deed convey to the purchaser the lands, lots, blocks, or parcels of land, railroad tracks and right-of-way so sold, and the title to such property shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and to insane persons having no guardian or curators, the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed.

Section 5. At such sale if there be no purchaser offering as much as the total tax or assessment, plus penalty, interest and all costs and attorney fees allowed, then said property shall be struck off to the plaintiff.

Section 6. Any person, firm or corporation having an interest in any property sold, may redeem the same as now required by law, provided that the Chancery Clerk in

writing up the certificate of redemption shall not charge and receive more than fifty cents for one separate call of property as listed and sold, and the sum of twenty-five cents for each additional call or description of property which the person, firm or corporation so redeeming may require to be redeemed and placed on said certificate.

Section 7. When the suit with the delinquent list is filed in the Chancery Court, the delinquent list of property shall be copied into a permanent record of delinquent lands, and the clerk shall receive as part of his costs the sum of ten cents for each separate line of description of property, which amount shall be paid by the plaintiff when the suit is filed, and shall be taxed and collected as part of the costs and refunded to the plaintiff. On said record of delinquent lands the clerk shall note all redemptions made prior to date of sale; also shall note on said record the redemption of lands after said sale, first recording after the description of each piece of property to whom it was sold or if sold to the plaintiff.

Section 8. This act is intended to supplement the laws now in force relative to foreclosure of assessment liens in municipal improvement districts, and the service by notice as herein provided shall be just as effective and binding on the property as though service was had under Section 5677 and 5679 of Crawford and Moses Digest of the Statutes of Arkansas.

Section 9. This act is declared to be severable and if any part hereof should be invalid it shall not affect the remainder of this Act. This Act is to be cumulative and shall repeal only those acts in direct conflict herewith.

Section 10. Whereas, the present method of foreclosing liens for past due assessments in municipal improvement districts is unduly costly and expensive to the property owners and to the Districts, an emergency is declared, and this Act is necessary for the preservation of the public peace, health and safety; an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage.

Approved: March 8, 1937.

ACTS OF ARKANSAS, 1925

Page 251

Act 85

Section 1. All taxes or assessments not now delinquent but now or hereafter levied on the real property of this state in any road improvement district, fencing district, levee district, bridge district, drainage district, sewer district, street improvement district, side walk district, water district, light district, gas district, or any other district, now or hereafter organized for the purpose of making any character of improvement authorized by law, whether said district be situated within the corporate limits of a city or town, or otherwise, if not paid within the time provided for the payment thereof, shall be delinquent, and the city collector, town collector, or any other person by whatever official title known (except the ex officio collector of the county where such property is situated) having in his custody or possession tax books for the purpose of collecting the taxes in any such district, shall, within sixty (60) days after any such delinquency, make out and file with the clerk of the Chancery court of the county in which said property is situated, upon a form to be approved by the said Chancery clerk, a list of all such real property of such county hereafter becoming delinquent. Provided, that the ex-officio collector of the county shall, in all respects, be subject to and shall comply with the provisions of this act except that he shall file with the Chancery clerk the delinquent list or lists required by this act within (100) one hundred days from the date such taxes become delinquent in his office. Said list shall be preceded with a caption, which may be in substance, as follows:

"The lands, town lots, railroads, tram roads, bridges and other property returned delinquent in ..... (stating the corporate name of the district) for the non-payment of taxes due said district for the year 19.. with the tax chargeable thereon, are contained and described in the following list:"

The said list shall include the name of the supposed owner as the same appears on the tax books, a description of the property, and the amount of tax due thereon, to which list the said collector shall append his affidavit that the same are true and correct, and said affidavit shall also state the time the said list became delinquent. The taxes shown delinquent by the said list shall be designated as the delinquent taxes for the year in which the same became payable. A separate list shall be made for each improvement district, and on the margin of said lists provision shall be made for the extension of penalty and cost and for the redemption of said property.

Section 6. When the board of commissioners, or any one authorized by law to file suit for the collection of such delinquent taxes desire to commence said suit, they shall obtain a certified copy of the remaining delinquent property on said list from the clerk which shall be filed with the complaint, or within ten days thereafter, and taken as part thereof. And the clerk for making said list shall be entitled to ten cents a tract payable in advance which shall be taxed as costs in said suit.

Provided, that the Chancery court of said county, by proper order in such case, may permit the clerk to furnish said list to said board of commissioners, or anyone authorized by law to file suit for the collection of such delinquent taxes, without requiring payment in advance, but in such event the clerk's fees for making and certifying such list shall be taxed as costs in the case, and become payable out of any fund collected from such delinquent property.

No suit for the collection of such delinquent taxes shall be brought after three years from the date such taxes become delinquent.

(the other portions of Act 85 of 1925 are omitted solely for the reason that they have no bearing at all on the questions involved in this appeal)

CRAWFORD AND MOSES DIGEST OF THE STATUTES OF ARKANSAS

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Section 5677. Name of last owner. In suits to foreclose the liens of assessments upon property in such improvement

districts the name of the last owner of the property as it appears in the recorders office shall always be given as the owner, and such party shall be made defendant, unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made defendant. Act March 3, 1913, p. 527, # 4.

CRAWFORD AND MOSES DIGEST

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Section 5678. Default decree. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and costs and an attorney's fee. Act March 22, 1881, p. 161, # 10.

Section 5679. Constructive service. If the sheriff, or other officer, to whom the writ may be directed, shall return that the defendant is not to be found in his county, or if the owner is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for fifteen days, and by publishing a copy of the summons in some daily or weekly paper, published in the city, for one insertion, and the cause shall be made ready for hearing within fifteen days after such publication, and a decree shall be rendered as in case of actual service. Id. #10.

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Section 5700. Terms of sale. All sales shall be for cash, and to the highest legal bidder. If sales are not completed on the first day, the commissioner shall continue the same day to day until completed. In other respects such sales shall be governed by the rules and laws regulating other sales of land made under decrees in chancery, and with like notice. Id. # 25.

Amendment 5

(Criminal actions—Provisions concerning—Due process of law and just compensation clauses)—No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. (Citizenship—Due process of law—Equal protection)—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEB 21 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 571

HERBERT STITH, ET AL.,

Appellants,

vs.

ED PINKERT, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

LEFFEL GENTRY,
U. A. GENTRY,
Counsel for Appellees.

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ARKANSAS SUPREME COURT

No. 9297

HERBERT STITH, ET AL.,

Appellants,

vs.

ED PINKERT, ET AL.,

Appellees

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

Appellees in the above entitled cause, for their joint statement, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented on this appeal is appellants' claim that the decree, and sale thereunder, of lands by a municipal improvement district, under Arkansas law providing for the foreclosure of delinquent assessments in a proceeding *in rem,* or in the nature of a proceeding *in rem,* without personal service on the owner of the property, is in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States. Appellees deny appellants' claim, and the Supreme Court of Arkansas, in the opinion and judgment here challenged, determined the question raised by appellants adversely to them.

Prior to the passage of Act 207 of the Acts of the General Assembly of Arkansas for 1937, the statute governing the foreclosure of delinquent assessments in improvement districts required personal service on the property owner, if known and a resident of the county (Acts of March 22, 1881, p. 161, Sec. 10), Crawford & Moses Digest (1921), Secs. 5678, 5679, and this statute was in force at the time of the institution of the foreclosure suit which later resulted in a decree of foreclosure and the sale of the property involved herein. Said Section 5678 of Crawford & Moses Digest, providing for personal service, was amended by Act 101 of the General Assembly of 1937, approved February 17, 1937, in which publication of a notice of the pendency of the suit was substituted for personal service, and in the same act, Sec. 5679 of Crawford & Moses Digest, the section providing for constructive service where the defendant could not be found in the county or the ownership was unknown, was specifically repealed (Act 101, Acts 1937, p. 381). Later, in the same session (1937) the legislature passed Act 207, a copy of which is appended to the plaintiffs-appellants' statement of jurisdiction, designated "Appendix D."

Said Act No. 207 was much broader than the previous amendatory act and covered the entire procedure for the foreclosure of delinquent assessments, including *inter alia* the nature of the pleadings to be filed, the character of notice to be given of the pendency of the suit and the manner of publication, the suggested form of notice, the character of the notice of sale to be published, the length of time that said notice of sale should be published, and the terms upon which the property should be sold. The Act provided that in the publication of the notice of the pendency of the suit the property should be listed in the name of the supposed owners, but that, "said proceeding and judgment shall be

in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and rights-of-way be incorrectly alleged in said proceeding, and such judgment shall be enforced wholly against such property and not against any other property or estate of said defendant."

The original foreclosure suit was filed by the improvement district on June 7, 1927, and by amendment to the original complaint, filed July 18, 1935, and the property involved herein was brought into the suit for delinquent assessments due in 1934. No further action was taken in the matter until after the passage of Act No. 207 of 1937, *supra*. Subsequent to the passage of said act there was a warning order published for the time and in the manner in said act provided, following which a decree was rendered on November 23, 1937. The property was sold on March 16, 1938, and was confirmed on April 12, 1938. In the complaint, the decree, and in the notice of the pendency of the suit, the supposed owner was given as James H. *Smith*. The real owner was James H. *Stith*.

Complaint is also made by plaintiffs-appellants that in the published notice of the sale of the property the supposed owner's name was not listed and it is also contended that the description in such notice was indefinite. There is no contention made, however, that the description was indefinite in the complaint or in the decree of foreclosure under which the property was sold.

Plaintiffs-appellants take the position that:

(a) Act No. 207 of 1937 of the Acts of the General Assembly of Arkansas, providing for a proceeding *in rem*, or in the nature of a proceeding *in rem*, for the foreclosure of assessment liens in municipal improvement districts, without personal notice to the owner of the property, is in

violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(b) That even if said Act No. 207 is valid, that the application of the act providing for substituted service to the present suit which was pending at the time of the passage of the act, would be in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(c) That the opinion and holding of the Supreme Court of the State of Arkansas that the sale of the property under a complaint and a decree naming James H. *Smith* as the owner of the property rather than James H. *Stith*, the true owner, is in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(d) That the holding of the Supreme Court that the confirmation of the sale cured any defects in the publication of the notice of sale, was in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(e) That the finding of the Supreme Court that there was no evidence of an effort to redeem the property constituted the taking of plaintiffs-appellants' property in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The appellants rely on the following cases to sustain the jurisdiction of this appeal:

Marx v. *Hanthorn*, 148 U. S. 172, 37 L. Ed. 410;
Griffin v. *Griffin*, 327 U. S. 220, 90 L. Ed. 635;
Virginia and West Virginia Coal Company v. *Charles*, 251 Fed. 83.

In the case of *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. Ed. 410, the question of due process under the Federal constitution was not involved. The decision is a review of a judgment in favor of the defendant, rendered by the Circuit Court of the United States, adjudging him to be the owner of the premises and entitled to the possession thereof, in an action brought by Emil Marx against Ida J. Hanthorn to recover possession of land in Portland, Oregon. The land in question admittedly belonged to Ida J. Hanthorn, but on the delinquent tax roll the property was listed as belonging to Ida J. *Hawthorn* and the property was advertised and sold as the property of Ida J. *Hawthorn*. The lower court held that, although not specifically stated, the fair meaning of the Oregon statutes required, in sales for taxes, that the name of the owner of the land to be sold should appear in the notice of sale; and the court was further of the opinion that to give notice that the property of Ida J. *Hawthorn* was to be sold was not notice that the property of Ida J. Hanthorn was to be sold. The sale involved, however, was a statutory proceeding, whereas the instant case involved the foreclosure of a lien in a court of competent jurisdiction, the matter of service being provided by the statute in which the property itself is made the defendant, and while the statute provides that in the publication of the notice of the pendency of the suit the name of the "supposed" owner shall be given, the statute specifically provides that it shall be immaterial if the true ownership be incorrectly stated and that the judgment shall be given against the lands only and not against the owner of the property. The difference between a statutory sale and a judicial sale is elementary. In the first, every step provided by the statute must be substantially followed. In the second, where the court acquired jurisdiction, any error or irregularity thereafter is cured by the confirmation of the sale.

In the case of *Griffin* v. *Griffin*, 327 U. S. 220, 90 L. Ed. 635, a judgment was entered for accrued instalments of alimony without notice to the husband. Mr. Justice Stone, in delivering the opinion of the court, uses this language:

> "Concededly, the 1938 judgment was entered without actual notice to or appearance by petitioner, and without any form of service of process calculated to give him notice of the proceeding."

Continuing, the Court later in the opinion says:

> "It is plain in any case that a judgment *in personam* directing execution to issue against petitioner and thus purporting to cut off all available defenses, could not be entered upon any theory of the state's power over him, without some form of notice by personal or *substituted service* (citing cases). Such notice cannot be dispensed with, even in the case of judgments *in rem*, with respect to property within the jurisdiction of the court rendering the judgment." (Emphasis ours)

Appellees concede that "without some form of notice by personal or *substituted service*" a judgment would be void and the taking of the property thereunder would be in violation of the due process clause of the Constitution of the United States. No such facts are, however, presented by the present record. The statute under consideration provides for the notice of the pendency of the suit in a manner reasonably calculated to advise all interested parties. *Mullane* v. *Central B. & T. Co.*, 339 U. S. 316, 94 L. Ed. 578, 584.

The case of *Virginia and West Virginia Coal Company* v. *Charles*, 251 Fed. 83, was a suit to establish the existence and contents of a lost document evidencing the title of one in possession of lands. It was held that the suit was not strictly *in rem* and the judgment therefore was binding only on the parties thereto. In the present case the Su-

preme Court of the State has held that the proceedings here involved were *in rem*. This being true, the case has no bearing on the question here involved.

Argument and Cases Supporting Motion to Dismiss or Affirm

Ordinarily, matters of local or state law are for the state courts and their decisions in respect thereto are binding on the Supreme Court. *Central Hanover Bank & Trust Co.* v. *Kelly*, 319 U. S. 94, 63 S. Ct. 945, 87 L. Ed. 1282. The question whether the action to foreclose the lien for delinquent assessments under the statutes of Arkansas is a proceeding *in rem* or *in personam* is one upon which the decisions of the Supreme Court of this state are binding on the Supreme Court of the United States. *Wood* v. *Brady*, 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981, and there is no Federal question involved in the finding of the trial court, which was affirmed by the Supreme Court of Arkansas, to the effect that there was no evidence in the record that the owner of the property had made any effort to redeem within the period allowed for redemption after the sale of the property under the decree. The question then narrows to whether or not the statute providing for a proceeding against the property by publication of a notice to all interested persons, for the time and in the manner therein provided, is such notice as is reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 316, 94 L. Ed. 578, 584.

Statutes commonly provide for the enforcement of a lien of a special or local assessment by some mode leading to the sale of such property. A suit or proceeding to enforce such a lien generally is in the nature of a proceeding *in rem*,

although against the owner of the land, at least where no personal liability attaches. 48 Am. Jur., pp. 738, 739, Sec. 215. Proceedings *in rem* for the foreclosure of tax liens, similar in all respects to the statute under consideration, the jurisdiction the court exercises under such statute, and the process by which that jurisdiction is acquired, have been upheld so often by the Supreme Court of the United States that it is sufficient to cite the decisions in which they have been sustained.

Leigh v. *Green*, 193 U. S. 79, 24 S. Ct. 390, 48 L. Ed. 623; *Winona & St. Peter Land Co.* v. *State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247; *Hagar* v. *Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569; *Longyear* v. *Toolan*, 209 U. S. 414, 28 S. Ct. 506, 52 L. Ed. 859; *Ballard* v. *Hunter*, 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461; *Ontario Land Co.* v. *Yordy*, 212 U. S. 152, 29 S. Ct. 278, 53 L. Ed. 449. To the same effect see *Seminole Fruit & Land Co.* v. *Scott*, 291 Fed. 179.

Cases from practically every State in the Union might be cited in which similar statutes have been upheld against the claim of a violation of due process. The case of *Spitcaufsky, et al.* v. *Hatten, Collector*, 353 Mo. 94, 182 S. W. 2d 86, 160 A. L. R. 990, is the subject of an annotation (160 A. L. R. 1026) where a great number of cases are correlated on the subject. See also *Reina, et al.* v. *Hope*, 158 Fla. 774, 30 So. 2d 173.

Of peculiar interest is the case of *Horne* v. *Ocala*, 143 Fla. 108, 196 So. 441, in which the precise question here was raised in an appeal to the Supreme Court of the United States and dismissed for want of a substantial Federal question. 311 U. S. 608, 61 S. Ct. 28, 85 L. Ed. 385.

The case of *Ballard* v. *Hunter*, 204 U. S. 241, 51 L. Ed. 461, is decisive of every Federal question raised in the present appeal. In that case a writ of error was prosecuted to review a judgment of the Supreme Court of Arkansas

sustaining the validity of a sale of land of plaintiff in error for levee taxes. The procedure provided for the sale of the lands for delinquent assessments where owned by non-residents, or where the ownership was unknown, was essentially the same as that procedure provided in the act presently under consideration. Notice of the pendency of the suit to be given non-residents and unknown owners, respectively, was by publication weekly for four weeks prior to the date of the term of court in which final judgment was to be entered, in some newspaper published in the county where the suit was pending. That same notice is provided for in the act under consideration, except that it applies to all landowners, residents as well as non-residents. In the reported case the form of notice which might be given was set out in the act which, like the statute here in question, listed the name of the supposed owner of the lands proceeded against. The exact language of the form of notice is set out in the margin of the opinion, 204 U. S. pp. 243, 244. The statute, also, as in the case at bar, provided that the proceedings should be in the nature of proceedings *in rem* and that it should be immaterial if the ownership of the land should be incorrectly alleged; that the judgment should be enforced only against the land and not against any other party. It was contended in the reported case "that the acts of 1893 and 1895 required a notice to be given to the owners of the lands proceeded against in the suit they provided for, and no such notice was given, and the sales were therefore unauthorized and void." (204 U. S. p. 249). This was based on the fact that the complaint showed that A. B. Ballard was the owner of the lands when in fact Josephine Ballard was the true owner, and that Josephine Ballard was not made a defendant in the suit although the records of the county disclosed that she was the owner thereof.

This same contention is made by the plaintiffs-appellants

in the instant case. They contend that the assessment records, prepared by the commissioners and filed with the city collector, and constructively in their possession, showed the true owner of the land to be James H. Stith, and, notwithstanding this fact, the complaint, the decree and the notice of the pendency of the suit named James H. Smith as the owner which, as they contend, did not constitute notice to the true owner. In answer to this contention in the *Ballard* case, *supra*, the Supreme Court said (204 U. S. pp. 261, 262):

> "But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case."

The language in the statute quoted in the *Ballard* case is exact with the language in the statute under consideration in the case at bar; and, if the naming of one other than the owner of the lands in the complaint and in the notice of the pendency of the suit constituted due process in the reported case, it is obvious that it would also constitute due process in the case at bar.

The other assignments of error do not raise any Federal question. The question of whether or not the statute required the notice of sale to list the name of the owner of the property, the question of whether or not the property was sufficiently described in the notice of sale, and the holding of the State Courts that there was no evidence in the record to show an effort to redeem the property from the sale under the decree, were matters exclusively within the jurisdiction of the Supreme Court of the state. This point, for a

different reason, was also passed upon in the *Ballard* case. There it was urged that the lands owned by plaintiffs in error were sold to pay the levee taxes on lands they did not own by reason of inaccurate description, and their lands were thereby taken without due process of law. The court said (p. 204):

> "What lands were properly assessed to Ballard and what lands he owned were facts to be alleged in the original suit and established by the proof there introduced or by admission through the default of the owners of the land. If there was error, it cannot be a ground for setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit does not take from it or its decree the attribute of due process."

So, in the present case, if it should be conceded that the description of the lands in the notice of sale was erroneous (the Supreme Court of the State held that the description was not indefinite) such error or irregularity not being jurisdictional, would not take from the decree and the sale of the property the "attribute of due process."

It is respectfully submitted that the questions presented in this appeal have long ago been so definitely determined that no substantial question is presented by this appeal entitling the appellants to invoke the jurisdiction of the United States Supreme Court.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Arkansas be affirmed.

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FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 571

HERBERT STITH, ET AL, APPELLANTS,

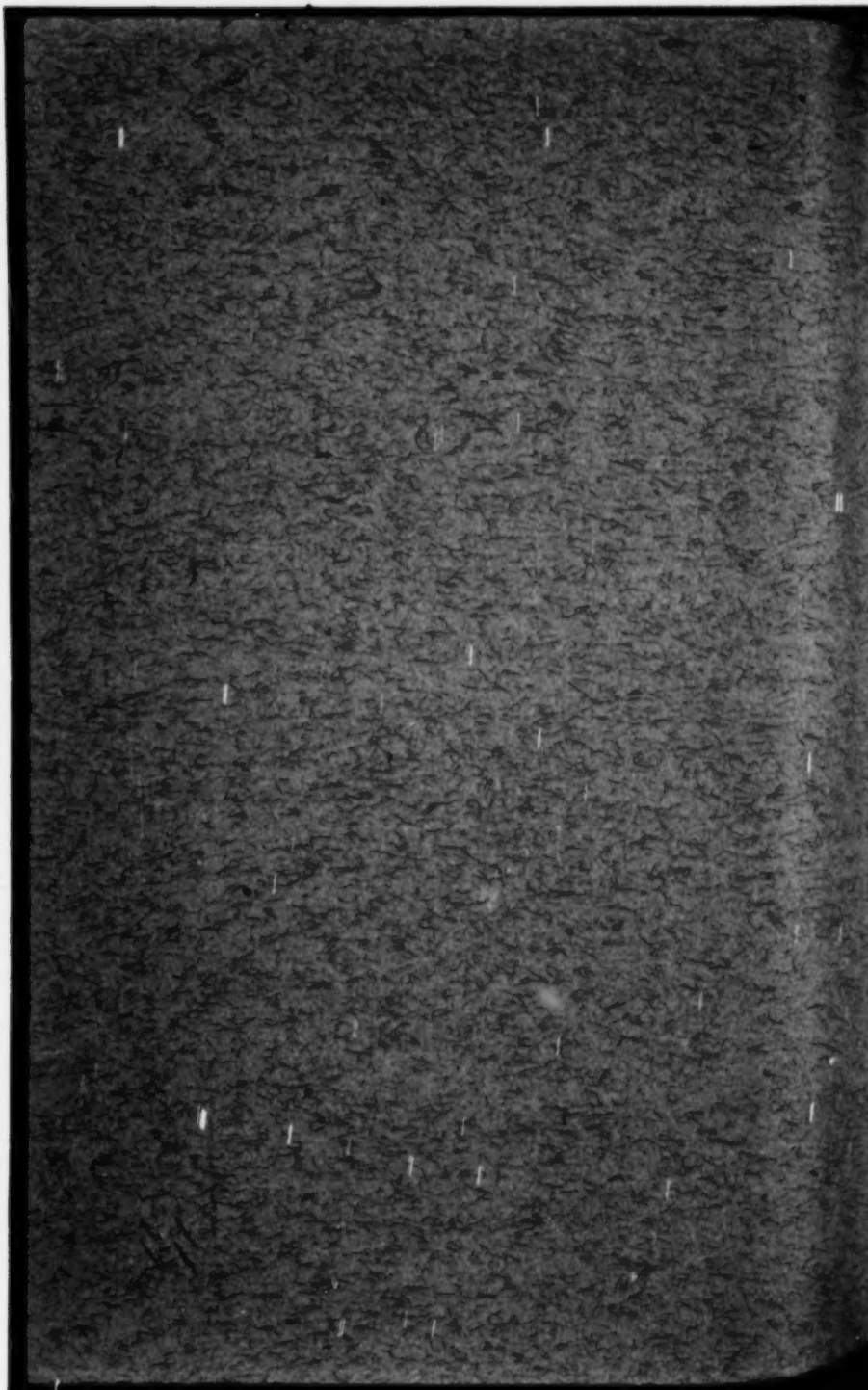
v.

ED PINKERT, ET AL, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

J. R. Booker,
Thurgood E. Dixon,
Counsel for Appellants.



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IN THE

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OCTOBER TERM, 1950

No.....

HERBERT STITH, ET AL, APPELLANTS,

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ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the Supreme Court of Arkansas is not reported as yet in the official Arkansas Reports, but, is reported in the Law Reporter, Vol. 92, No. 16, page 642. A copy of the opinion is attached to Appellants' Statement As To Jurisdiction as Appendix A. A copy of the Motion to Rehear and the Order of the Supreme Court of Arkansas denying rehearing is attached to Appellants' Statement As To Jurisdiction as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on November 13, 1950 and the Order Denying Rehearing was entered on December 11, 1950. The Petition For Appeal was filed in the Supreme Court of Arkansas on December 29, 1950 and same was granted and allowed on the same date. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257 (2). In order not to unduly burden the Court with an endless repetition, we respectfully refer the Court to Appellants' Statement As To Jurisdiction which sets out fully the stage of the proceedings, the manner raised, and the method in which the Federal questions were raised, and the way in which they were passed upon by the Supreme Court of Arkansas. Briefly Act 207 of 1937, Acts of Arkansas, the application of the Act to the case at bar, the want of notice in the improvement district foreclosure proceedings, the want of notice in the sale of the lands involved herein, the owner of the lands not having had his day in court, were all raised and challenged in the complaint as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; these questions were passed upon adversely to the contentions of Appellants by the Supreme Court of Arkansas as well as the lower court; and these same questions were raised again in the Motion To Rehear which was denied. The questions of the refusal of the Supreme Court of Arkansas to consider the Statutes In Pari Materia upon the same express subject in construing and applying Act 207 of 1937, Acts of Arkansas, thus placing a construction and application upon said Act 207 that is in violation of the due process clause of the 14th Amendment to the Constitution of the United States, the

sale of the lands by a commissioner after partial redemption of same, the Supreme Court of Arkansas' holding that there was no evidence of same, and the holding of the Supreme Court of Arkansas that Appellants were barred by Stare Decisis, all came as a surprise and could not be anticipated by Appellants and were raised and attacked for the first time in the Motion to Rehear upon the same grounds as the other questions above as being in violation of the 14th Amendment to the Constitution of the United States in violation of due process of law. (See Statement As To Jurisdiction pages 1-7 incl.).

QUESTIONS PRESENTED

These questions are briefly as follows: 1. Act 207 of 1937, Acts of Arkansas does away with the necessity of notice and makes it immaterial that the owner of lands be made a party to foreclosure suits by municipal improvement districts and is thus unconstitutional in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 2. The application of Act 207 of 1937 to a suit pending at the time of its passage is unconstitutional in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 3. *STITH* was not made a party to and had no notice of the proceedings wherein his lands were foreclosed and sold, notice to *SMITH* is not notice to *STITH, STITH* did not have his day in court, and thus his lands were taken in violation of due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 4. The notice of the sale of the lands involved herein did not name anyone as the owner and did not sufficiently

describe the lands to be sold, thus constituting no notice whatsoever and such want of notice is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 5. The application of Act 207 of 1937, Acts of Arkansas, by the Supreme Court of Arkansas without considering the Statutes In Pari Materia upon the same express subject, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; 6. The decision of the Supreme Court of Arkansas that there was no evidence that James H. Stith had attempted in good faith to redeem his lands during the period of redemption, when the record shows to the contrary, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; and, 7. The holding of the Supreme Court of Arkansas that Appellants were barred by Stare Decisis in *Pinkert* v. *Lamb*, 215 Ark. 879, is in violation of the due process clause of the Constitution of the United States.

All other questions set forth in the Assignment of Errors are also presented.

STATUTES INVOLVED

Act 207 of 1937, Acts of Arkansas; Act 85, Acts of Arkansas 1925; Sections 5677, 5678, 5679 and 5700, Crawford and Moses' Digest of the Statute of Arkansas, are set out in Appendix D attached to the Statement As To Jurisdiction, however the pertinent parts of same are set out in this brief pages 17 to 20 inclusive. Act 101, Acts of Arkansas 1937; Act 130, Acts of Arkansas 1939; Sections 17 and 18, Act 195, Acts of Arkansas 1949; are all set out in this brief pages 19 to 22 inclusive.

STATEMENT

It is undisputed that James H. Stith owned the lands involved in this appeal at the time Sewer Improvement District 94 foreclosed and sold said lands and that he died in 1942 leaving Appellants herein as his sole heirs at law. It is also undisputed that the original foreclosure suit was filed by the District in 1927 and that the lands involved herein were brought into the suit by an amendment to the complaint, filed July 18, 1935 for delinquent assessments due for the year 1934, wherein *James H. Smith* (and not *James H. Stith* the real owner) was named party defendant; that two years later in 1937 subsequent to the enactment of Act 207 of 1937, a warning order was published naming therein *JAMES H. SMITH* as the owner of the lands; that the decree rendered on November 23, 1937 named *JAMES H. SMITH;* that the notice of the sale did not name any person as the owner; that the lands were sold to the District in 1938; and that the real owner was *JAMES H. STITH,* who lived upon said lands and died in possession of same in 1942 during the period of redemption which expired in 1943; and it is further undisputed that Ella Stith, widow of James H. Stith, remained in possession of said lands until she was dispossessed by the Supreme Court of Arkansas in the case of *Pinkert* v. *Lamb,* 215 Ark. 879, opinion rendered October 17, 1949; and it is further undisputed that Appellants herein were never at any time parties to the suit of *Pinkert* v. *Lamb, supra.*

Appellants herein brought their suit attacking the validity of the foreclosure sale setting up in brief that the proceedings were void because James H. Stith, their father, was not a party to the foreclosure proceedings, did not have his day in court, had no notice of same even though

the Commissioners of the District knew from their own records that he owned the lands, that James H. Stith was the last owner of record, that the sale was void because the description of the lands in the notice of the sale was incorrect and insufficient and because the notice did not name anyone as the owner of the lands to be sold, that Act 207, Acts of Arkansas 1937 and its application to the case at bar and to the foreclosure proceedings which were pending at the time of its enactment, along with a number of other allegations, were all in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The Chancery Court held for defendants-appellees and the plaintiffs-appellants appealed to the Supreme Court of Arkansas which again held for defendants-appellees affirming the decision of the Chancery Court.

The Supreme Court of Arkansas erred in holding:

1. That Act 207, Acts of Arkansas 1937, did not violate the due process clause of the 14th Amendment to the Constitution of the United States.

2. In holding that Act 207, Acts of Arkansas 1937, applied to the case at bar because the foreclosure proceedings attacked were pending at the time of the enactment of said Act 207.

3. In holding that notice to *SMITH* was binding upon *STITH*.

4. In holding that the not naming of the owner of the lands in the notice of the sale and the insufficient description of the lands to be sold in said notice of sale, was cured by the confirmation of the sale.

5. In failing to consider the statutes In Pari Materia upon the same express subject along with Act 207, Acts of Arkansas 1937, in construing and applying said Act 207 and thus by such failure to consider said Statutes placed an interpretation and application of said Act 207 that is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

6. In holding that there was no evidence in the record that James H. Stith had attempted in good faith to redeem his lands during the period of redemption.

7. In holding that plaintiffs-appellants are barred under the rule of Stare Decisis by the decision in the case of *Pinkert* v. *Lamb*, 215 Ark. 879.

SUMMARY OF ARGUMENT

Every person is entitled to his day in court and to be given notice of any proceedings wherein his land is being taken from him. When a foreclosure suit is filed under a law requiring the last owner of record to be made a party defendant in municipal improvement district foreclosure proceedings and subsequent to the filing of said suit the law is changed wherein constructive notice is substituted for personal notice and the subsequent law makes it immaterial that the correct name of the owner be stated in the proceedings, said subsequent law by its own terms not being retroactive but is prospective, then the application of said subsequent law to a suit pending at the time of its enactment is violative of the owner's rights and is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

Act 207, Acts of Arkansas 1937, according to the construction given it by the Supreme Court of Arkansas, does away with the necessity of notice to the landowners by providing that it is immaterial that the ownership of lands be incorrectly alleged. Said Act 207 does also provide that the *supposed owner* be made a party defendant and that the *supposed owner* be named in the warning order. These words and phrases in said Act 207 make said Act ambiguous. The *supposed owner* must be named in the proceedings and yet it is immaterial if the owner named is incorrectly given. If Act 207, Acts of Arkansas 1937 does away with the necessity of notice as the Supreme Court of Arkansas has construed it to mean, then said Act 207 is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Appellants also contend that the Supreme Court of Arkansas erroneously construed said Act 207 by making it retroactive and also erroneously construed said Act 207 by failing to consider statutes In Pari Materia upon the same express subject and by such error placed an invalid construction upon said Act 207.

Notice of the pendency of the proceedings to *SMITH* is not notice to *STITH*. Then there was no notice as to the sale of the lands because the notice given did not name anyone as the owner and did not correctly describe the lands to be sold. This complete want of notice renders the foreclosure proceedings void from the beginning.

The purpose of this brief is not to duplicate the argument in the Statement As To Jurisdiction but is to oppose the Motion to Dismiss or Affirm of Appellees. Appellees contend that the case of *Ballard* v. *Hunter*, 204 U. S. 241, 51 L. Ed. 461 is conclusive of the issues in this appeal.

Appellants contend that *Ballard* v. *Hunter, supra,* is not conclusive of the issues herein and in fact does not apply to the case at bar.

All other points of law and questions set forth in the assignment of errors are also presented even though not argued in this brief and will be covered in the brief on the merits of this appeal.

ARGUMENT

I

The Case of Ballard v. *Hunter,* 204 *U. S.* 241, 51 L. Ed. 461 *Is Not Conclusive of the Issues in This Appeal.*

Appellees concede, on page 5 of their Motion to Dismiss or Affirm, "that "without some form of notice by personal or *substituted service*" a judgment would be void and the taking of the property thereunder would be in violation of the due process clause of the Constitution of the United States." It is undisputed: that the foreclosure proceedings in the case at bar were pending at the time Act 207, Acts of Arkansas 1937, was enacted; that *James H. Smith* was named in the complaint, notice of the pendency of the suit, and in the decree; that *James H. Stith* was the actual owner of the lands involved herein; that the notice of the sale of said lands did not name anyone as the owner of the lands; and it is contended by Appellants that the lands were incorrectly described in the notice of the sale of same, and Appellees do not seriously oppose this contention, but do say on page 10 of their Motion to Dismiss or Affirm, in concluding their argument:

> "So, in the present case, if it should be conceded that the description of the lands in the notice of the sale was erroneous (the Supreme Court of the State held that the description was not indefinite) such error or irregularity not being jurisdictional, would not take from the decree and the sale of the property the 'attribute of due process.' "

In proceedings in personam or in proceedings in rem, there must be notice by personal or substituted service, if such notice is defective so as to constitute no notice or so as to constitute a misleading notice then the proceedings are void as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. It is clear that notice to *SMITH* is not notice to *STITH*, the naming of *SMITH* in the complaint, warning order, and decree, certainly was not notice to *STITH* and *STITH* could not be bound thereby. *STITH* reading the warning order in the newspaper could not tell that he was a party to the proceedings and could not tell from said warning order that he was involved at all because the warning order notified *SMITH* to appear and defend. Notice to *SMITH* certainly would mislead *STITH* and this misleading notice rendered the proceedings void. *STITH* was an ignorant colored person and one could not expect him to know he was being sued when the published notice of the pendency of the action named *SMITH* and did not name *STITH*. Notice to *SMITH* is not notice to *STITH* and the lands of *STITH* were taken without notice in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The notice of the sale did not name any person as the owner and described the lands in such a jumbled way that no person of average intelligence, much less *STITH*, an ignorant col-

ored person, could ascertain just what lands were to be sold. There was never any valid notice at any time. Such notices as were given actually constituted no notice whatsoever to *STITH* that his lands were to be foreclosed upon and sold. The notice of the sale was as follows:

> "The following described real estate, to-wit: Lots 21, 22, Block 1, lots 1 to 6 inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6, West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition."

See opinion of the Supreme Court of Arkansas attached to the Statement As To Jurisdiction, Appendix A, page 5.

It is clear to the writer of this brief that no person of average intelligence, and certainly not *STITH*, an ignorant colored person, could ascertain just what lands that were to be sold. The description given above in the notice of the sale does not clearly show whether it is lots or blocks or just what is to be sold. *STITH'S* lands are correctly described as: the West half of Lots 1, 2, 3, 4, 5, and 6, Block 8, Adams Addition to the City of Little Rock, Arkansas. The notice of the sale given above does not contain the correct description of *STITH'S* land. If there was no notice as to the naming of *STITH* in the proceedings and the notice of the sale did not name him and did not correctly describe his lands, then there was no notice at all. There must be notice somewhere in the proceedings in order that the due process of law requirements are met with. But here *STITH* had no notice and was not named in the complaint, warning order, decree and the notice of the sale neither named *STITH* nor did it correctly describe the lands. There was just no notice whatsoever and the lands

of *STITH* were taken in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. These following cases clearly uphold Appellant's contentions on these points of law:

> *Marx* v. *Hanthorn*, 148 U. S. 172, 183, 184, 37 L.Ed. 410, 414; *Moses H. Scott* v. *John H. McNeal, et al*, 154 U. S. 34, 45, 46, 47, 38 L.Ed. 896, 901, 902; *Hale* v. *Finch*, 104 U. S. 261, 26 L.Ed. 732; *Gratiot County State Bank* v. *Johnson*, 249 U. S. 246, 63 L.Ed. 587; *Griffin* v. *Griffin*, 327 U. S. 220, 90 L.Ed. 635; and *Virginia and West Virginia Coal Co.* v. *Charles*, 251 Fed. 83.

In *Marx* v. *Hanthorn, supra*, this Court held that notice to *Ida J. Hawthorn* was not notice to *Ida J. Hanthorn* and the sale of *Hanthorn's* lands was void and that such notice was misleading. So it follows that notice to *SMITH* is not notice to *STITH* and the sale of *STITH'S* lands is void and such notice is misleading.

On the question of judgments in rem it is well to consider the principles set out in *Patton On Titles*, Section 257, Pages 819, 826 and 827, where it is clearly stated that property cannot be taken without due process of law, one essential of which is some form of notice of a hearing at which the matter will be judicially determined (page 819). Then on page 826 we find the following language:

> "The notice published must give in many states a sufficient description of the property involved in the action, and correctly state the relief asked, but need not name the defendants specifically, other than those who are served by publication. *They are sufficiently described if designated by the names under which they appear in the record chain of title,* (emphasis ours)

even if those names or incorrect or have since been changed by marriage or otherwise."

Then on page 827 we find this statement:

"There is no presumption to aid the record on such a purely statutory matter as constructive service of notice, and the files should therefore show affirmatively that publication, and proof thereof, was made in precisely the manner required by law." *Patton On Titles,* Sec. 257, pages 819, 826, 827.

As to constructive notice from the recording of instruments *Patton On Titles,* Section 55, pages 215, 216, we find that there is no constructive notice when two names, though pronounced alike begin with a different letter, or used in one instance as one whole word and in another instance separated so as to form a middle name or initial, such as Patrick Fitzpatrick in one instance and Patrick Fitz Patrick in another.

In the case at bar *JAMES H. STITH* was the record owner of the lands involved herein and yet in the foreclosure proceedings *JAMES H. SMITH* was notified to appear and defend. Notice to *SMITH* is not notice to *STITH.*

Defendants-appellees claim that the case of *Ballard* v. *Hunter,* 204 U. S. 241, 51 L. Ed. 461, is conclusive of the issues in this appeal and rely entirely upon this case. Appellees cite a number of cases holding that constructive service does not violate due process of law. That question is not before the Court at all and we agree that constructive service if strictly complied with and if given to the right parties and if it gives sufficient notice in the proper

time and manner, that such service is generally speaking valid. That question was not raised by Appellants at all. The question is that where a suit is filed and is pending under a law that requires personal service and subsequently an Act is enacted during the pendency of the suit that does away with personal service and provides for constructive service upon residents and provides that it is unnecessary or immaterial that the name of the person notified be incorrectly given, that such an Act if applied to such pending suit is invalid, both, because it changes the nature of the proceedings and because it does away with the necessity of the giving of sufficient notice. Also such an Act cannot be applied to such pending suit. These changes in the law applied to a suit that is pending violates a person's rights under the 5th and 14th Amendments to the Constitution of the United States. *Ballard* v. *Hunter,* 204 U. S. 241, did not cover these express points at all and did not cover the other points as to the misnomer of names presented here in this appeal.

In *Ballard* v. *Hunter, supra,* A. B. Ballard and Josephine W. Ballard were non-residents of the state of Arkansas and brought suit to set aside the sale of their lands by the foreclosure proceedings at the instance of the St. Francis Levee District, and contended that non-residents were entitled to be notified the same as residents by personal service claiming that the requirement of constructive service upon unknown owners and non-resident owners was in violation of due process of law. The principal point involved was the constitutionality of a special Act of the legislature that provided for personal service upon residents and constructive service upon unknown and non-resident owners of lands. The Court held that such pro-

visions were valid and that non-resident owners could not complain that they were given constructive notice and that the law did not require non-residents to be given personal service as to the pendency of the action. At no time did this Court pass upon the question of not naming the owner who is a resident in the notice published and this Court did not pass upon the question of a misleading notice being published wherein the name of the resident owner, who was known to the District to be the owner, was incorrectly stated. At no time did this Court pass upon the question of giving an Act a retroactive application when such Act was by its own terms not retroactive. The questions involved in *Ballard* v. *Hunter, supra,* are not involved in this appeal at all. The statute involved in *Ballard* v. *Hunter, supra,* was applied to non-resident and unknown owners of land and was not word for word the same as in the statute involved in the case at bar, even though several portions or parts of the statutes in both cases are somewhat similar. Yet the actual statute in the case at bar is different from that in *Ballard* v. *Hunter, supra,* and the facts are entirely different. The questions presented in this appeal are not the same questions as those passed upon in *Ballard* v. *Hunter, supra.* It is clear to the writer of this brief that *Ballard* v. *Hunter, supra,* does not apply to the case at bar and is not conclusive at all of the issues involved in this appeal.

Act 207, Acts of Arkansas 1937, contains no provision whatsoever that makes it retroactive, but, upon the contrary expressly provides that it shall be cumulative and supplemental to the laws in existence at the time of its enactment. No law is ever to be given a retroactive construction unless the language used in it will admit of no other construction. Act 207, Acts of Arkansas 1937, is by its own terms pros-

pective and is not retroactive at all and does not apply to the case at bar because the foreclosure proceedings wherein the land involved herein was sold was pending at the time of its enactment. The decision of the Supreme Court of Arkansas holding that Act 207 of 1937 was retroactive in effect and applied to the case at bar constitutes the taking of appellants' lands in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

On the question of statutory construction as to when an Act is retroactive and when it is not retroactive we quote from one of the leading authorities on the subject: *Sutherland Statutory Construction*, 3rd Edition, Horack, Section 2201, page 115:

> "Retrospective operation is not favored by the courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."

Sutherland Statutory Construction, 3rd Edition, Horack, Section 2212, page 135:

> "Beginning with Kent's dictum in *Dash* v. *Van Kleeck*, it has been continuously reaffirmed that 'The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."

The law at the time the foreclosure proceedings wherein the lands involved herein were sold, provided for personal service upon residents and provided that the last owner of record be made a party defendant to the proceedings.

STITH was the last owner of record and was not personally served and was not made a party to the proceedings. Act 207, Acts of Arkansas 1937 was enacted while said proceedings were pending and by its own terms said Act 207 is not retroactive, therefore the decision of the Supreme Court of Arkansas holding that said Act 207 of 1937 is retroactive and that it applied to the case at bar is in grave error and should be reversed with directions.

II

The Historical Background of the Legislation Clearly Shows That the Legislature Did Not Intend to Do Away With the Necessity of Notice and the Necessity of Making the Last Owner of Record a Party Defendant to Foreclosure Proceedings in Municipal Improvement Districts.

In construing statutes it becomes necessary at times to consider prior and subsequent legislation upon the same express subject in order to determine the intention of the legislature and to determine the correct construction to place upon the statute under consideration. Statutes In Pari Materia are frequently read with the statute under consideration in order to properly construe the law. In order to correctly determine the law in the case at bar we quote below the pertinent provisions of prior and subsequent Acts along with Act 207 of 1937, Acts of Arkansas.

CRAWFORD AND MOSES' DIGEST OF THE STATUTES OF ARKANSAS

Page 1527

Section 5677. Name of last owner. In suits to fore-

close the liens of assessments upon property in such improvement districts the name of the last owner of the property as it appears in the recorder's office shall always be given as the owner, and such party shall be made defendant, unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made defendant. Act March 3, 1913, p. 527, §4.

Section 5678. Default decree. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and costs and an attorney's fee. Act March 22, 1881, p. 161, §10.

ACT 85, ACTS OF ARKANSAS, 1925

Page 251

Section 1. * * * * *

The said list shall include the name of the supposed owner as the same appears on the tax books, a description of the property, and the amount of the tax due thereon, to which list the said collector shall append his affidavit that the same are true and correct, and said affidavit shall also state the time the said list became delinquent. * * * * *

Section 6. When the board of commissioners, or any one authorized by law to file suit for the collection of such delinquent taxes desire to commence said suit, they shall obtain a certified copy of the remaining delinquent property on said list from the clerk which shall be filed with the complaint, or within 10 days thereafter, and taken as part thereof. * * * * *

ACT 101, ACTS OF ARKANSAS 1937

Page 381

Section 1. That section No. 5679 of Crawford and Moses' Digest of the Statutes of Arkansas be, and the same is hereby amended to read as follows: "Notice of the pendency of said suit shall be given by publication weekly for two (2) weeks before judgment shall be entered for the sale of such lands in some newspaper published in the County where such suit is pending, which published notice may be in the following form: 'COMMISSIONERS OF IMPROVEMENT DISTRICTS vs. DELINQUENT LANDS.' "All persons having a claim and interest in any of the following described lands are hereby notified that suit is pending in the Chancery Court in_____ County, Arkansas, to enforce the collection of certain improvement district assessments on the following list of lands, the names of each supposed owner having been set opposite together with the amount of taxes due on each tract,_____"

Section 11. (repeals Sections 5679 and 5682 of Crawford and Moses' Digest of the Statutes of Arkansas.)

Section 111. (provides that the purpose of the act is to reduce the expense of foreclosure proceedings in municipal improvement districts.)

ACT 207, ACTS OF ARKANSAS 1937

Page 758

AN ACT to Amend and Supplement the Law Governing the Foreclosure of Liens for Assessments Due in Municipal Improvement Districts, and Other Purposes.

Section 2. * * * * * Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall

be immaterial that the ownership of said lands, * * * be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant * * *

Section 3. (provides for a warning order to be published weekly for four weeks.) * * * * *

All persons, firms, or corporations having or claiming an interest in any of the following described lands,..... ....., are hereby notified and warned that suit is pending in the Chancery Court of.....County, Arkansas, to enforce the collection of certain.....taxes or assessments on the subjoined list of lands each supposed owner having been set opposite his or her or its lands .....(Then shall follow a list of supposed owners, with a description of each separate property that is delinquent, and amount due thereon respectively as aforesaid).....

Section 4. (provides for the lands to be sold after published notice weekly for two weeks.)

Section 8. (provides that the Act is supplemental to the laws now in force.)

Section 9. (provides that the Act is cumulative.)

Section 10. (provides that the purpose of the Act is to reduce the expense and costs of foreclosure proceedings.)

ACT 130, ACTS OF ARKANSAS 1939

Page 300

Section 1. (merely amends Section 7315 Pope's Digest, Act 207 of 1937, Section 3 to provide for publication of the warning order for two weeks instead of four weeks as required in Act 207 of 1937, Section 3. The other wording

in the form of notice is in exact language a duplication of Section 3, Act 207, 1937 and states in part as follows; "(Then follows a list of supposed owners, with a description of each separate property that is delinquent . . . . . .).

Section 2. (provides that the purpose of the Act is to reduce the expense in foreclosure proceedings.)

ACT 195, ACTS OF ARKANSAS 1949

Page 598

AN ACT to Provide More Protection For the Owners of Property Located Within Municipal Improvement Districts: and for Other Purposes.

Page 605

Section 17. Before filing suit to collect delinquent installments, The Board of Commissioners shall obtain from the Clerk of the Chancery Court or the officials having the delinquent list a certified list of all lots, blocks and parcels of land unredeemed. This list shall contain the description and the name of the supposed owner. * * * The Board of Commissioners shall submit said list to a competent abstractor who shall compile a list of the names and last known addresses of the owners of record of all tracts included in the list prepared by the clerk and shall certify as to the source of the addresses furnished by him. * * * Certified copies of both lists shall be attached as exhibits to the complaint. Twenty days prior to the filing of the complaint the Board shall cause to be mailed, by registered mail with return receipt requested, to each record owner as listed by the abstractor, a notice describing the delinquent property, specifying the year of delinquency, and the amount or the approximate amount necessary for redemption, and informing the owner as to the date on which the suit will be filed. As an exhibit to the Complaint there

shall be attached an affidavit of the person or persons who mailed the notices; said affidavit shall set forth a copy of the notice, show the date the notices were mailed, the names and addresses, of the last owners of record and to whom the notices were mailed, and a list of all notices which, because of insufficient addresses, were returned prior to the filing of the Complaint. * * *

Page 607

Section 18. * * * * *

Such proceedings shall in nature be in rem, and insofar as the rights of the purchaser are concerned, it shall be immaterial that the ownership of the lots, blocks or parcels of land be incorrectly alleged in the proceedings. The decree shall be enforceable only against the property and not against any other property or estate of the defendants or the true owners of the delinquent property. * * *

After considering fully all the above quoted statutes we find that in Section 5677 of Crawford and Moses' Digest of the Statutes of Arkansas that the *last owner of record* must be made a party defendant to the foreclosure proceedings; that Act 85 of 1925, Acts of Arkansas requires that the *supposed owner as the same appears on the tax books* must be made a party defendant; that Act 101, Acts of Arkansas 1937, requires that the *supposed owner* be named in the proceedings; that Act 207, Acts of Arkansas 1937, requires that the *supposed owner* be named in the proceedings and provides that it shall be *immaterial* that the ownership be incorrectly alleged in the proceedings; that Act 130, Acts of Arkansas, 1939, requires that the *supposed owner* be named in the proceedings; that Act 195, Acts of Arkansas 1949, requires that the *last owner of record* be given notice of the proceedings and be made a party defendant and provides that it shall be *immaterial* that the owner-

ship of the lands be incorrectly alleged in the proceedings. What did the legislature mean and intend by the use of the words: LAST OWNER OF RECORD, SUPPOSED OWNER, and IMMATERIAL THAT THE OWNERSHIP BE INCORRECTLY ALLEGED?

We find that the words LAST OWNER OF RECORD and SUPPOSED OWNER mean one and the same thing. One would suppose that the last owner of record really owned the land and one has constructive notice of ownership as is shown in the recorder's office. There is no other meaning to give these words than that the word *supposed owner* was meant to mean the *last owner of record.* Both terms are used in all the statutes and in the last one Act 195 of 1949, Acts of Arkansas, both terms are clearly shown to mean the same thing. Now take the word *immaterial* as is used in all the statutes quoted above, we find that in the last, Act 195 of 1949, that after providnig that the *last owner of record* must be notified of and be made a party to the proceedings and that it shall be *immaterial* if the ownership of the lands be incorrectly alleged therein. Now what is the meaning of this combination of terms? We find that the only logical interpretation to place upon this is that if the *last owner of record* is made a party to and given notice of the proceedings then it shall be *immaterial* (and then only) that the ownership be incorrectly alleged in the proceedings. Act 207 of 1937 did not expressly repeal Section 5677 of Crawford and Moses' Digest which requires the *last owner of record* to be made a part to the proceedings, nor was said Section 5677 repealed by implication. *Supposed owner* means *last owner of record.* Thus it is clear in the mind of the writer of this brief that the law, at the time the land involved in this action was sold,

required the last owner of record to be made a party to the proceedings. *James H. Stith,* now deceased, father of appellants herein, was the *last owner of record* and his correct name and address was shown in the tax records of the improvement district itself, and yet he was not made a party to those proceedings and was not given notice of same. Such was not due process of law.

It is proper to consider and read together prior laws and subsequent laws along with the law under consideration in order to correctly determine what the law is. Statutes In Pari Materia should be considered in construing a certain statute. *Sutherland Statutory Construction,* 3rd Edition, Horack, Section 5202, page 539; *Vane* v. *Newcombe,* 132 U. S. 220, 235, 33 L.Ed. 310, 315; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309, 55 L.Ed. 738, 747; *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 73 L.Ed. 170; *Roberts* v. *Tice,* 198 Ark. 397; *LaFargue* v. *Waggoner,* 189 Ark. 757, 763, 764.

The authorities above quoted are decisive on this question of statutory construction. In a footnote to the opinion of the case at bar the Supreme Court of Arkansas stated that Act 130 of 1939 and Act 195 of 1949 did not apply to the case at bar because they were passed subsequently to Act 207 of 1937 (see Statement As To Jurisdiction, Appendix A, p. 4). The Supreme Court of Arkansas is in error in their construction of the statute. In the case at bar the Supreme Court of Arkansas held that Act 207 of 1937 stood alone and in construing it as standing alone, held that it made no difference who was named in the proceedings as long as some one was named. This is the effect of the decision in the case at bar. If this be true then one might

name his pet dog ROVER as the owner of the lands and then take same from the owner of record or the real owner. Such was not the intention of the legislature and such was not the true construction of the statute.

We submit that it is clear that the decision in the case at bar is in error and that the Supreme Court of Arkansas by such error placed a construction upon Act 207 of 1937 that renders said Act invalid in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and remanded with directions that title to the lands involved herein be fixed in Plaintiffs-Appellants and that Defendants-Appellees account to Plaintiffs-Appellants for the rents collected by them.

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January 10, 1951

No. 571. STITH ET AL. *v.* PINKERT ET AL. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *J. R. Booker* and *Tilghman E. Dixon* for appellants. *Leffel Gentry* for appellees. Reported below: 217 Ark. 871, 234 S. W. 2d 45.